SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 355

TRINITY FARM CONSTRUCTION COMPANY,
APPELLANT,

vs.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS FOR THE STATE OF LOUISIANA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

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[fol. 2]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

In Equity. Number 271

TRINITYFARM CONSTRUCTION COMPANY, Plaintiff,

vs.

ALICE LEE GROSJEAN, Supervisor of Public Accounts of the State of Louisiana, et al.

BILL OF COMPLAINT—Filed Nov. 2, 1932

To the Honorable the United States District Court for the Eastern District of Louisiana, Baton Rouge Division, in equity:

The plaintiff, Trinityfarm Construction Company, brings this, its bill of complaint, against Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, and her officers, agents and employees, and for cause of action respectfully shows:

1

Plaintiff, Trinityfarm Construction Company, is and was at all times hereinafter mentioned a private corporation, chartered and existing under the laws of the State of Delaware, with its principal office at the City of Wilmington within said State, and a citizen and resident of said State.

2

Defendant, Alice Lee Grosjean, is and was at all times mentioned herein the duly qualified and acting Supervisor of Public Accounts of the State of Louisiana, being the office of said State authorized and required by law to enforce the provisions of certain purported laws of said State known as Act No. 6 of the Legislature of Louisiana for the

year 1928, as amended by Act No. 8 of the Legislature of Louisiana for the year 1930, as amended by Act No. 16 of the Legislature of Louisiana for the year 1932, and to enforce the provisions of Act No. 1 of the Extra Session of the Legislature of Louisiana for the year 1930.

3

The office of defendant is fixed by law at Baton Rouge, [fol. 3] Louisiana, within the Eastern District of the State of Louisiana, where the defendant has her official domicile, which is within the territorial jurisdiction of this Honorable Court.

4

This case is of a civil nature and involves in excess of the sum of Three Thousand Dollars, exclusive of interest and costs, and involves the construction, meaning and effect of the provisions of the laws and statutes of the State of Louisiana, and the acts of said Supervisor of Public Accounts of the State of Louisiana and of her officers, agents, employees, and representatives, each and all of which plaintiff alleges to be in conflict with and repugnant to the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, and in conflict with and repugnant to Paragraph 3 of Section 8 of Article 1 of the Constitution of the United States which confers upon the Congress of the United States exclusive power to regulate commerce with foreign nations and among the several States; and in conflict with and repugnant to Article 1, Section 2 of the Constitution of the State of Louisiana which provides that no person shall be deprived of life, liberty or property except by due process of law, and that private property shall not be taken except for public purposes and after just and adequate compensation is paid. Plaintiff further alleges that this case involves questions arising under the Constitution and laws of the United States and more particularly under Article 1, Section 8, Clause 3 of the Constitution and under the Act of May 15, 1928 (45 Stat. 534), commonly known as the Mississippi Flood Control Act, passed pursuant thereto, all as hereinafter more fully appears. Plaintiff further alleges that this case involves an attempt on the part of

the Supervisor of Public Accounts of the State of Louisiana, under color of the said statutes of the said State of [fol. 4] Louisiana, and on the part of her agents, officers, representatives and employees, to deprive plaintiff of rights secured to plaintiff by the Constitution of the United States of America and the laws enacted pursuant thereto and especially to deprive plaintiff of rights secured to plaintiff by the Articles of the Constitution of the United States and Laws of the Congress of the United States above referred to. Plaintiff further alleges that the acts of the Legislature of the State of Louisiana herein complained of, are repugnant to, in conflict with and violative of Section 16, Article III of the Constitution of Louisiana, which provides that every law shall embrace but one object and shall have a title indicative of such object.

5

Plaintiff is authorized by its charter to make and perform contracts for construction of public works including especially the construction of levees for the United States of America as a part of said Mississippi Flood Control program. Heretofore, to-wit, on July 16, 1931, and on August 5th, 1932, plaintiff entered into two separate contracts with the United States of America for the construction of two levees known as the Cottage-Kempe Levee and the Kempe-Lake St. John Levee, respectively, both in the Parish of Tensas, State of Louisiana, upon which contracts plaintiff is, and at all times since the respective dates thereof, has been continuously engaged.

6

Plaintiff alleges that the construction of each of such levees is required by the contract providing therefor to be completed within a stated number of days; that plaintiff has been required to give and has given performance bonds, binding it and its surety to the completion of the construction of each of such levees within the time provided by the contract therefor and that in default of such completion plaintiff will be required to pay to the United States the sum of Twenty and no/100 ($20.00) Dollars, per day for [fol. 5] each day each or either of such levees may remain uncompleted after the completion dates stipulated therefor.

7

Plaintiff further alleges that the construction of said levees is a function and purpose of the Federal Government, undertaken by it pursuant to the exclusive control of the Congress over commerce between the several States; that such construction is being carried on exclusively upon rights of way furnished the United States therefor and which are exclusively under the jurisdiction and sovereignty of the United States and that the State of Louisiana is wholly without power or jurisdiction in the matter of the construction of such levees and is especially without power to impose any burdens or restrictions upon the use by plaintiff of its equipment necessary in the performance of its said contracts with the United States for the construction of such levees.

8

Plaintiff further alleges that in order to carry out and perform its said contracts with the United States, plaintiff has purchased and agreed to purchase a large amount of equipment necessary for the prompt and efficient performance of said work, including dragline machines, tractors, trucks, graders, wagons and gasoline, a portion of which equipment has heretofore been placed by plaintiff upon said Government rights-of-way and is now and at all times herein mentioned has been used exclusively in actual construction of said levees, and the remainder of which, to-wit, ten carloads of gasoline, it is necessary that plaintiff place upon said rights-of-way and use exclusively in the completion of such work.

9

Plaintiff now alleges that it owns and has under valid contracts to purchase within the states of Arkansas and Texas ten car loads of gasoline, containing approximately [fol. 6] eighty thousand (80,000) gallons, all of which plaintiff has purchased exclusively for use in construction of said levees and all of which is necessary for such purpose.

10

Plaintiff now alleges that the fair and reasonable value of said gasoline is Five Thousand and no/100 ($5,000.00) Dollars.

11

Plaintiff alleges that it is guaranteed the right by the Constitution and statutes of the United States aforesaid to bring into the State of Louisiana all equipment necessary for the performance of said contracts, including, especially, said ten car loads of gasoline, and that it is necessary to the completion of said contracts that it be permitted so to do.

12

Plaintiff now avers, that, despite its rights above set forth, defendant, her agents, officers, representatives and employees, are purporting to act pursuant to the terms of said Act No. 6 of 1928, as amended and pursuant to the terms of said Act No. 1 of the extra session of 1930, of the State of Louisiana, in an effort to exact and compel from plaintiff payment of excise taxes to the State of Louisiana at the aggregate rate of five cents per gallon for the privilege of using each gallon of gasoline so used by plaintiff in the performance of its said contracts with the United States, amounting in the aggregate to Four Thousand and no/100 ($4,000.00) Dollars, exclusive of interest, penalties and costs.

13

That said acts of the State of Louisiana likewise purport to make said gasoline responsible for payment of such attempted excises, together with panalties and costs, and purport to grant to defendant, her agents, representatives, officers and employees, the right to attach said gasoline for non-payment of such tax, penalties and costs.

[fol. 7]

14

That the said acts are violative of and repugnant to the Constitution of the State of Louisiana in that they propose to tax plaintiff as a dealer in gasoline, merely because it makes use of gasoline for the purpose of performing its said contracts with the United States, which purpose or object is not indicated by the titles to said acts.

15

That said acts are violative of and repugnant to the Constitutions of the State of Louisiana and of the United

States for the reason that they purport to levy an excise tax upon the equipment of the plaintiff employed exclusively in work for the United States and used exclusively as a means for the performance by the Federal Government of a function exclusively within its jurisdiction.

16

That, in violation of law and despite the protests of plaintiff, the defendant did, on the 29th day of October, 1932, cause to be seized two cars of gasoline, amounting in all to Sixteen Thousand (16,000) gallons of gasoline, and is now seeking to impose upon plaintiff the said illegal tax together with penalties and costs, with reference to the gasoline thus unlawfully seized.

17

That, in further violation of law, the said defendant threatens to and, unless prevented by proper orders of this Honorable Court, will seize and confiscate the said gasoline and all other gasoline which plaintiff brings into the State of Louisiana upon its introduction into the State of Louisiana, and thereby prevent plaintiff from completing its said contracts with the United States, all to plaintiff's great and irreparable damage in that plaintiff will thereby be prevented from performing its said contracts [fol. 8] with the Government and will thereby lose earnings which it would otherwise have made and incur penalties and losses which it would otherwise escape.

18

Plaintiff says further that all of its said gasoline is for use in performance of its said contracts with the United States, exclusively upon Government rights-of-way, and for no other purpose whatsoever; that no portion of said gasoline is used or intended to be used upon the public roads, highways or bridges of the State of Louisiana, that the excise taxes which defendant, her agents, officers, representatives and employees are seeking to exact of plaintiff, are sought to be collected solely as the price plaintiff is called upon to pay for the privilege of using its own equipment in performance of its said contracts with the United States.

19

Plaintiff now avers that said laws of the State of Louisiana and each and every act of defendant, her officers, agents, representatives and employees, done and threatened to be done pursuant thereto, in an effort to impose said excise upon plaintiff or the privilege of using its said gasoline as part of its equipment in performing its said contracts with the United States, are null, void, unenforceable and contrary to law in that the effect of said laws and of each of such threatened acts pursuant thereto, would be to retard, burden and impede operations of the General Government undertaken pursuant to its Constitution and laws, and to deprive plaintiff of rights conferred thereby.

20

Plaintiff now avers that it is without adequate remedy at law in that it has no means of securing equipment necessary for performance of its said contracts with the United States except through payment of taxes for which it is not legally liable and which it cannot recover at law from the [fol. 9] defendant or the State of Louisiana if the same are paid; that unless restrained by proper orders of this Honorable Court, defendant, her officers, agents, representatives and employees will subject plaintiff to numerous and groundless suits and seizures, which will delay and impede plaintiff in prosecution of the said contracts with the United States and cause plaintiff a large financial loss and expense, no portion of which could plaintiff recover at law from defendant, her officers, agents or representatives or from the State of Louisiana.

21

Plaintiff further avers that under the Constitution and laws of the United States and under the Constitution and laws of the State of Louisiana and under the Rules and practice of this Court, it is entitled to a temporary restraining Order and to an interlocutory injunction for the reason that unless the said restraining order and said interlocutory injunction shall issue herein its said gasoline will be obliged to pay the said illegal excise taxes or to suffer its property to be seized to its irreparable injury as aforesaid.

Wherefore, as plaintiff is without adequate remedy at law for protection in this matter, plaintiff respectfully prays:

That proper process issue and be served upon the defendant, Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, making her a party defendant to this suit and requiring her to appear and answer this bill within the time allowed by law but not under oath, answer under oath being expressly waived.

That an order to show cause issue herein directed to the said defendant and requiring her to appear and show cause why a preliminary injunction should not issue, as herein prayed for, enjoining and restraining the defendant, her successors in office, her officers, agents, representatives and employees, and any and all persons or parties acting under [fol. 10] their suggestions, directions, control or authority, from endeavoring or attempting to collect or require the payment of the said illegal tax, or any part thereof, or from interfering in any way directly or indirectly with plaintiff in the use of its said equipment, and, more particularly, in the use of its said gasoline; and from prosecuting or causing to be prosecuted any suit or suits against the plaintiff or its agents, servants or employees, to collect any taxes, fines or penalties or impose any prison sentences because of the failure or refusal to pay said tax, fines, penalties or costs in connection therewith.

That upon final hearing of this cause the said preliminary injunction may be made permanent and defendant, her successors in office, attorneys, agents, officers, representatives or any one whomsoever acting under their orders, authority, director or control be permanently enjoined from interfering with the plaintiff in the use of its equipment, and more particularly, its said gasoline, or from imposing or attempting to impose any excise taxes or penalties upon plaintiff or its agents, servants, or employees because of the failure or refusal to pay such tax, and from prosecuting or causing to be prosecuted any suit or suits against the plaintiff its officers, agents or employees, to collect any fines or penalties because of the failure or refusal to pay said tax.

That, in as much as immediate and irreparable loss or damage will result to plaintiff unless a restraining order be granted before this matter can be heard on notice before three Judges in accordance with the requirements of the

Statutes in such cases made and provided, a temporary restraining order without notice be made and do issue to the defendant, Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, restraining her and her officers, agents, representatives and employees and all persons whomsoever acting for or under them or by their authority, to the extent and in the manner hereinabove prayed for.

[fol. 11] That notice of this application be served upon the Governor of the State of Louisiana, and upon the Attorney General of the State of Louisiana, giving said Governor and said Attorney General at least five days' notice of the hearing to be had.

And plaintiff prays for such other and further relief as may be equitable or proper in the premises.

(Sgd.) D. K. Woodward, Jr., Breazeale & Sachse,
Attorneys.

[fol. 12] *Duly sworn to by H. Payne Breazeale. Jurat omitted in printing.*

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

TEMPORARY RESTRAINING ORDER—Filed Nov. 2, 1932

On motion of the Plaintiff herein, Trinityfarm Construction Company, through its attorneys, D. K. Woodward, Jr., and Breazeale and Sachse:

And, upon consideration of the Bill of Complaint filed herein and it appearing from the said Bill of Complaint and the affidavit annexed thereto that immediate and irreparable injury would enure to Plaintiff unless a temporary restraining order do issue herein pending the hearing upon the application for a preliminary injunction,

It is ordered and decreed that a temporary restraining order do issue herein restraining and enjoining the defendant, Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, her officers, agents, representatives and employees and any and all persons or parties acting under their suggestion, direction, control or authority, from endeavoring or attempting to collect or require the payment

[fol. 14] of the said tax, of any part thereof, or from interfering in any way, directly or indirectly, with the plaintiff, its agents and employees, in the use of its equipment, and, more particularly, with the use of its gasoline; and from prosecuting or causing to be prosecuted any suit or suits against the plaintiff or its agents or employees, to collect any taxes, fines or penalties or to impose any prison sentences because of the failure or refusal to pay said tax, fines, penalties or costs in connection therewith; and that this restraining order be and remain in effect to the 12th day of November, 1932, or to any further time to which the same may be extended.

It is further ordered and decreed that the plaintiff file bond in the sum of Six Thousand & no/100 ($6,000.00) Dollars, to be approved by the Judge of this Court, or in the absence of the Judge, by the Clerk of this Court, conditioned upon the prompt and full payment of any loss or damage the said defendant may sustain by reason of this temporary restraining order being issued without notice.

It is further ordered and decreed that immediate notice of not less than five days of said hearing be given to Oscar K. Allen, Governor of the State of Louisiana, Gaston L. Porterie, Attorney General of the State of Louisiana, and also to the defendant, Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana.

(Sgd.) Wayne G. Borah, Judge.

New Orleans, Louisiana, November 2nd, 1932, 4:45 p. m.

[fol. 15] Bond on restraining order for $6,000, approved and filed Nov. 2, 1932, omitted in printing.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT—Filed Nov. 28, 1932

Now into this Honorable Court, through undersigned counsel, come defendants in the above numbered and entitled cause, and for answer to plaintiff's bill of complaint aver as follows:

I

Respondents admit the allegations of paragraph one of plaintiff's bill of complaint.

II

Respondents admit that the Supervisor of Public Accounts of the State of Louisiana is charged with the duty of enforcing the provisions of Act 6 of the Extra Session of the Legislature of Louisiana of 1928, as amended by Act 8 of the Legislature of Louisiana of 1930, and by Act 16 of the Legislature of Louisiana of 1932, and to enforce the provisions of Act 1 of the Extra Session of the Legislature of Louisiana of 1930, the latter being an amendment to the Constitution of the State of Louisiana, duly submitted to and ratified by the qualified electors of said State at an election held November 4, 1930.

III

Respondents admit the allegations of paragraph three of plaintiff's bill of complaint.

IV

Respondents admit that this case is of a civil nature and involves a sum in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and that it involves the construction, meaning and effect of the provisions of Act 6 of the Extra Session of the Legislature of Louisiana of 1928, as amended by Act 8 of the Legislature of Louisiana of 1930 and Act 16 of the Legislature of Louisiana of 1932, and also involves the construction, meaning and effect of the provisions of an unnumbered Article of the Consti- [fol. 17] tution of the State of Louisiana, submitted under the provisions of Act 1 of the Extra Session of the Legislature of Louisiana of 1930, and duly ratified by the qualified electors of the State of Louisiana at an election held November 4, 1930.

Respondents deny that the aforesaid Act 6 of 1928, as amended, and the aforesaid unnumbered Article of the Constitution of the State of Louisiana, are in any manner in conflict with or repugnant to the 14th Amendment to the Constitution of the United States; or that they are in any manner in conflict with or repugnant to Article 1, Section 8,

Clause 3 of the Constitution of the United States; and that they are in any manner in conflict with or repugnant to Article I, Section 2, of the Constitution of the State of Louisiana.

Respondents specially deny that this case involves questions arising under the Act of Congress of May 15th, 1928, commonly known as the Mississippi Flood Control Act, except in a most immaterial and incidental manner.

Respondents specially deny that this case involves any attempt on the part of the Supervisor of Public Accounts of the State of Louisiana to deprive plaintiff corporation of any rights secured to it by the Constitution of the United States or the laws thereof, or of any rights guaranteed to it by the Constitution and laws of the State of Louisiana.

Respondents specifically deny that the Acts of the Legislature of the State of Louisiana referred to are in any manner in conflict with or violative of Section 16, Article III of the Constitution of Louisiana.

V

Respondents admit the allegations of paragraph five of plaintiff's bill of complaint.

VI

Respondents admit the allegations of paragraph six of plaintiff's bill of complaint.

VII

Respondents admit that the Federal Government has undertaken to construct the levees which plaintiff company [fol. 18] has contracted to build under its aforesaid contracts referred to in paragraph five of its bill of complaint.

Respondents further admit that such levee construction work is being carried on exclusively upon rights of way furnished to the United States therefor by the State of Louisiana and the Tensas Levee District of Louisiana.

Respondents specifically deny that the aforesaid rights of way are exclusively under the jurisdiction and sovereignty of the United States, and specifically deny that the State of Louisana is wholly without power or jurisdiction

in the matter of the construction of said levees, or without power or jurisdiction over the rights of way upon which the same are being constructed.

Respondents particularly deny that the State of Louisiana has imposed, or intends to impose, any burden or restriction upon the use by plaintiff of such equipment as is necessary for it to employ in the performance of its said contracts with the United States Government for the construction of the levees aforesaid; but respondents admit and aver that it is the purpose of the State of Louisiana, through its aforesaid Supervisor of Public Accounts, to collect the excise taxes due to the State of Louisiana, which are imposed under the provisions of the aforesaid Act 6 of 1928, as amended, and the aforesaid Act 1 of the Extra Session of the Legislature of Louisiana of 1930, the latter being in fact an amendment to the Constitution of the State of Louisiana, duly adopted and ratified by the qualified electors of the said State at an election held on November 4, 1930, which aforesaid excise taxes are due to the State of Louisiana by complainant company by reason of the importation into the State of Louisiana from without the boundaries thereof, of gasoline by complainant company as a dealer therein, which gasoline complainant company has imported, stored, held, distributed, and handled for its own use and consumption within the State of Louisiana, and which aforesaid importation into, storage, distribution and use within the State of Louisiana classifies complainant company as a dealer, as aforesaid, within the intendment of the aforesaid Act 6 of 1928, as amended, and the [fol. 19] aforesaid unnumbered Article of the Constitution of the State of Louisiana, and on all of which said gasoline thus imported from other states and used by it, the aforesaid complainant company, as dealer, is required to pay the taxes on the gasoline so imported and used the same as if it had been sold for domestic consumption, all as provided by the aforesaid Act 6 of 1928, as amended, and the aforesaid unnumbered Article of the Constitution of the State of Louisiana.

Respondents specifically deny that the gasoline so imported into Louisiana and used and consumed by complainant company within said State, is in any sense a part of the equipment of complainant company.

VIII

Respondents specifically deny that any part of the equipment of complainant company used in the carrying out of its aforesaid contracts with the United States Government for the construction of the levees aforesaid, such as draglines, machines, tractors, trucks, graders and wagons constitute equipment specially purchased or acquired by complainant company for exclusive use in carrying out the aforesaid work it has contracted with the United States Government to perform, but that the same constitutes the regular and ordinary equipment suitable for employment in any work of a similar character whether of a public or private nature.

Respondents specifically deny that such gasoline as complainant company has imported into and used and consumed within the State of Louisiana on the work aforesaid, was in any sense a part of the equipment of complainant company, or may reasonably or legally be considered as such.

Respondents specifically deny that complainant company is under contractual obligation with the United States Government to import into the State of Louisiana and to use in said State gasoline in any quantity, but aver that importation of such commodity has been undertaken by complainant company voluntarily and of its own accord, and that if any license tax is imposed by the laws of Louisiana upon dealers who import gasoline into said State for use, sale or consumption of such commodity in Louisiana, that com- [fol. 20] plainant company, so respondents are informed and believe, has obligated itself, by the terms of its aforesaid contracts with the United States Government, to pay such license or excise tax without additional expense to said Government.

Respondents specifically deny that the rights of way for the levees which are being constructed by complainant company are rights of way belonging to the United States Government, or that the United States Government has any proprietary interest in said rights of way.

IX

Respondents admit that complainant company has imported and expects to import from other states into the State of Louisiana for distribution and use therein, ten car

loads of gasoline containing approximately 80,000 gallons; and that plaintiff has stored, and expects to store, hold, distribute, handle, use, and consume all of said gasoline within the State of Louisiana.

X

Respondents admit the allegations of paragraph ten of plaintiff's bill of complaint.

XI

Respondents admit the allegations of paragraph eleven, except that respondents specifically deny that the gasoline imported by complainant company into Louisiana, or which it expects to import into Louisiana, for use within said State, is in any sense a part of the equipment of the complainant company, or that complainant company is in any sense obligated under its aforesaid contract to import said gasoline into the State of Louisiana, or that it is essential to the completion of plaintiff company's aforesaid contracts that it be permitted to do so, particularly without payment to the State of Louisiana of the taxes legitimately due to said State under the provisions of the aforesaid Act 6 of 1928, as amended, and the aforesaid provisions of the Constitution of Louisiana.

XII

Respondents admit that it is the purpose of the Supervisor of Public Accounts of the State of Louisiana to en- [fol. 21] force as against complainant company, as an importer of gasoline into Louisiana for distribution and use therein and hence a dealer in gasoline as defined by the aforesaid Act 6 of 1928, as amended, and by Act 1 of the Extra Session of 1930, the letter being an amendment to the Constitution of the State of Louisiana, and to that end to collect from plaintiff company as a dealer in gasoline the excise taxes legitimately due to the State of Louisiana by it as aforesaid, which said excise taxes would approximate $4,000.00 on the amount of gasoline which complainant company alleges it has imported and expects to import into Louisiana.

XIII

Respondents admit the allegations of paragraph thirteen of plaintiff's bill of complaint.

XIV

Respondents deny the allegations of paragraph fourteen of plaintiff's bill of complaint.

XV

Respondents deny that the aforesaid Acts of the Legislature of Louisiana or the aforesaid unnumbered Article of the Constitution of said State are in any manner violative of or repugnant to the Constitutions of the United States and of the State of Louisiana; respondents specifically deny that the aforesaid statutes or constitutional provisions of the State of Louisiana purport to levy an excise tax upon the equipment of the plaintiff company employed by it in its work for the United States Government, but that the taxes are imposed and are sought to be collected on gasoline imported into the State of Louisiana from without the boundaries thereof, by complainant corporation as dealer, for distribution, sale, or use in the State of Louisiana, and by reason of which importation, under the provisions of the statutes and constitutional provisions aforesaid, plaintiff company is a dealer in gasoline and as such dealer is required to pay the excise taxes imposed upon such dealer on the amount of gasoline so imported into and used in Louisiana by it, the same as if said gasoline had been sold for domestic consumption.

Specially and further answering this paragraph, re- [fol. 22] spondents aver and show that if complainant company, by the language employed by it in paragraph fifteen of its bill of complaint herein, means to plead exemption from payment of said excise taxes on the ground that it is an agency or instrumentality of the United States Government, then respondents deny that plaintiff company is such an agency or instrumentality, and aver, on the contrary, that it is an independent contractor; and, further, that if such exemption is intended to be pleaded, plaintiff company is without cause or right to urge the same since such exemption, if properly pleadable is personal to the United States of America and may only be claimed by it by direct appearance or intervention in this proceeding.

Further specially answering, respondents aver and show that plaintiff company does not allege, aver or contend in paragraph fifteen of its aforesaid bill of complaint, or in

any other paragraph thereof, that the Government of the United States, in so far as the execution of the present contracts with complainant company is concerned, will suffer any financial loss or burden by the imposition upon and collection from complainant company of the excise taxes aforesaid, or that said Government will in any manner effect a saving in the cost of the work contracted to be done by complainant company under its aforesaid contracts with the United States Government in the event complainant company is absolved from payment of the aforesaid excise taxes by this Honorable Court.

XVI

Respondents admit the seizure of gasoline referred to in paragraph sixteen of plaintiff's bill of complaint, but deny that said seizure was in any manner unauthorized and illegal, and that the taxes sought to be collected, together with penalty and costs, are likewise in any manner unauthorized and illegal.

XVII

Respondents admit that it is the purpose of the Supervisor of Public Accounts of Louisiana, in the performance of the duty imposed upon her by law, to resort to all means and measures provided by the Act 6 of 1928, as amended, [fol. 23] and the Constitutional provisions hereinabove referred to, in order to collect the aforesaid excise taxes legitimately due to the State of Louisiana by complainant company.

Respondents specifically deny that the enforcement of the aforesaid statutes or constitutional provisions of Louisiana work great and irreparable damage to complainant company or that complainant company will in any manner thereby be prevented from performing its aforesaid contracts with the United States Government, and that it will be subjected to loss, penalties or costs, unless it fails to comply with the provisions of the aforesaid statutes and constitutional provisions of Louisiana.

XVIII

Respondents admit the allegations of paragraph eighteen of plaintiff's bill of complaint, except to deny that the

United States Government has any proprietary interest in the rights of way upon which plaintiff is presently constructing levees under its aforesaid contracts with said Government; and to further specially deny that the excise taxes sought to be collected from complainant company upon gasoline imported by it into Louisiana as a dealer for use therein, "are sought to be collected solely as the price plaintiff is called upon to pay for the privilege of using its own equipment in performance of its said contracts with the United States."

Respondents aver, on the contrary, that the excise taxes aforesaid are not imposed upon plaintiff company for the privilege of using its equipment in Louisiana, but are imposed upon and sought to be collected from complainant company for the privilege of engaging as a dealer in the distribution, use or sale of gasoline in Louisiana, since it admittedly has imported said gasoline into said State from other States for distribution, sale and use in Louisiana, and has thereby become such a "dealer" within the intendment of and as particularly defined by the aforesaid Act 6 of 1928, as amended, and the aforesaid Constitutional provisions of Louisiana, and from which "dealer" the excise taxes aforesaid, under the statutes and Constitutional provisions aforesaid, are properly collectible.

XIX

Respondents deny the allegations of paragraph nineteen [fol. 24] of plaintiff's bill of complaint for the reasons set forth in paragraph eighteen of this answer, and respondents now particularly aver and show that the aforesaid excise taxes accrue, are due and become collectible immediately upon the gasoline coming to rest in the State of Louisiana by reason of the removal and unloading of the same from the railroad tank cars, in which it is brought into the State, into the storage tanks of complainant company in Louisiana. That if the aforesaid gasoline becomes a part of plaintiff company's equipment at all, which is denied, it can only become a part of such equipment after its withdrawal and distribution from the storage tanks aforesaid, since its status and established situs while in said storage tanks cannot be changed except by such withdrawals and distribution, irrespective of the nature of its subsequent utilization by complainant company.

Respondents specially aver and show that the ultimate use to which the aforesaid gasoline is put in the State of Louisiana, subsequent to its withdrawal and distribution from the storage tanks of complainant company, and after it has attained a situs in said State as aforesaid, is not only not an issue in this cause, but respondents specially deny that such ultimate use is the criterion by which the right of the State of Louisiana to tax the same is to be guaged, your respondents on the contrary averring and showing that the status of said gasoline at the time it is withdrawn and distributed from complainant company's aforesaid storage tanks, regardless of the nature and character of use to which it may subsequently be put in Louisiana, is alone to be considered in determining the right of said State to tax the same.

XX

Respondents deny the allegations of paragraph twenty of plaintiff's bill of complaint.

XXI

Respondents deny complainant company's alleged right to either a preliminary or permanent injunction herein; and particularly deny that the aforesaid excise taxes sought to be collected by the State of Louisiana are illegal or un-
[fol. 25] constitutional, or that plaintiff company will suffer irreparable injury by reason of the payment of said excise taxes.

XXII

And now further and specially answering, respondents aver and show that it is informed and believes, and so believing avers, that complainant company has included in the price bid by it for the construction work covered by its aforesaid contracts with the United States Government the price of all gasoline intended to be used by it in the execution of its aforesaid contracts, plus the amount of the excise taxes it may be required to pay as a dealer in such gasoline, based upon the number of gallons of gasoline distributed from complainant company's aforesaid storage tanks and to be used by it on the work aforesaid, and that complainant company does not offer to return the amount of said excise taxes to the United States Government, or obligate or commit itself to a diminution of said contract

price with said Government in an amount proportionate and equal to the amount of said excise taxes, in the event plaintiff company is absolved from payment of said taxes by this Honorable Court.

XXIII

Further and specially answering respondents show that they are informed and believe, and believing aver, that complainant company, by the specific terms of its aforesaid contracts with the United States Government is obligated, without additional expense to said Government, to obtain all required licenses and permits in connection with the prosecution of the work contracted to be done by complainant company, and respondents specially aver and show that the excise taxes sought to be collected by the State of Louisiana from complainant company are mere license taxes imposed by the State of Louisiana upon complainant company for the privilege of conducting the business of dealer in gasoline within said State, and is of the very character of "Licenses" which complainant company has obligated itself under its aforesaid contracts with the United States Government to obtain without additional expense to said Government.

Further specially answering, respondents aver and show that complainant company's present action is merely an [fol. 26] effort whereby it seeks to enrich itself and enhance its profits under its aforesaid contracts with the United States Government both at the expense of the State of Louisiana and at the expense of the United States Government by claiming exemption from payment of the excise taxes aforesaid on the ground that said taxes constitute a burden upon the means whereby complainant company is endeavoring to fulfill its aforesaid contracts with said Government, which aforesaid conduct constitutes a sham, fraud and subterfuge resorted to in an effort to disguise the fact that it has by contractual obligation bound itself to pay such excises or licenses without additional expense to the United States Government, and thus to retain for its own profit, use and benefit the amount of said excise taxes which it has already included in the price of its bids for the aforesaid work contracted to be done by it for the United States Government, and which amount it has not and does not obligate itself to restore to the United States Government in

the event complainant company is absolved from the payment of the aforesaid excise taxes, all to the unjust, unjustifiable and inequitable impairment and diminution of the tax revenues of the State of Louisiana, and without profit, benefit or advantage to the United States Government.

XXIV

Further and specially answering, respondents aver that complainant company's failure in its bill of complaint herein to obligate or pledge itself to restore and return to the United States Government the amount of the aforesaid excise taxes already added to and included in its bids and contract price for the construction work aforesaid, or to diminish and deduct from its aforesaid contract price a sum equal to the amount of the aforesaid excise taxes in the event complainant company is absolved by this Honorable Court from paying the same, is in effect and in fact to invoke the aid of this Honorable Court in the perpetration of a fraud against the United States Government and the State of Louisiana and constitutes a violation of the restrictive maxim of equity which enjoins that "He who comes into Equity must come with clean hands," and which aforesaid omission, failure and neglect to do equity, and which aforesaid unrighteous and unconscionable acts and [fol. 27] conduct, which if upheld would amount to a fraud upon both the United States Government and the State of Louisiana, directly affect the equitable relations between defendants and complainant and arise out of the transactions which form the subject of plaintiff's suit, and to which unconscionable and iniquitous acts and conduct a Court of Equity cannot lend its aid.

XXV

And now further and specially answering, but in the alternative only, respondents aver that the aforesaid Act 6 of 1928, nor its aforesaid amendments, nor Act 1 of the Extra Session of Louisiana of 1930, have ever been at any time declared illegal or unconstitutional by any court of competent jurisdiction; that the legality and constitutionality of all statutes are presumed until the contrary has been judicially determined; that everyone is presumed to know the law and may not plead ignorance thereof, for all

of which reasons complainant company is presumed to have had notice and knowledge that importers of gasoline into the State of Louisiana as dealers, for distribution, sale, use or consumption therein, were required to pay an excise or license tax for the privilege of engaging in such business, said excise tax or license tax aggregating five cents per gallon on all gasoline or motor fuel sold, used or consumed in the State of Louisiana for domestic consumption. That if complainant corporation failed to compute the aforesaid license or excise taxes in its aforesaid bids as forming a part of the basic cost of the work contracted to be done by it for the United States Government, it failed to exercise a right which prudent and intelligent bidders are presumed to exercise, and hence displayed a lack of vigilence the consequences of which it alone must bear. That having slumbered on its rights it now seeks to retrieve its error at the expense of the State of Louisiana, which, if permitted to do, would be tantamount to penalizing said State for complainant company's lack of vigilance, and for its having slumbered on its rights, and to enable it to profit by its aforesaid laches at the expense of the State of Louisiana, all of which likewise directly affects the equisable relations between defendant and complainant, and to which unconscionable and iniquitous act and conduct a Court of equity cannot lend its aid.

[fol. 28] Wherefore respondents pray that complainant company's petition be dismissed for want of equity; that its prayer for any form of equitable or other relief be denied; and respondents further pray for all other orders and decrees necessary in the premises, for costs, and for all general and equitable relief.

(Sgd.) Gaston L. Porterie, Attorney General. S. (Sgd.) Peyton R. Sandoz, Special Ass't Attorney General. (Sgd.) Justin C. Daspit, Special Ass't Attorney General.

Duly sworn to by Alice Lee Grosjean. Jurat omitted in printing.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREED STATEMENT OF FACTS—Filed Nov. 28, 1932

Statement of facts and admissions agreed upon by complainant and defendants in the above numbered and entitled cause, at New Orleans, Louisiana, on this 28th day of the month of November, A. D. 1932, the same to be submitted to the court in lieu of specific and individual proof of each admitted fact, and to serve as a comprehensive outline of the issues of fact and of law involved in the above numbered and entitled cause, and upon which, it is agreed, judgment of the court, either interlocutory or definitive, may be predicated

It is admitted:

1. That complainant is a private corporation organized under the laws of the State of Delaware, with its principal office at No. 7 West Tenth Street, in the City of Wilmington, County of New Castle, in said State.

2. That included in the independent nature of the business for which it was organized, and the objects and purposes to be transacted, promoted or carried on by it, are: "To contract for the erection, construction or repair of any building, structure or improvement, Public or private, and erect, construct or repair same or any part thereof, and to acquire, own and prepare for use any materials for said purpose."

3. That public levee construction work is one of the the objects for which complainant company was organized, and that such work, under the laws of Louisiana, is denominated a work of "public improvement."

4. That complainant company's charter authority to undertake works of public improvement is not exclusive, but by virtue of the independent nature of its business any work which it may be authorized by its charter to undertake may be executed as well for private individuals, and corporations.

5. That complainant company is under contract with the United States Government to construct what is known as

the Kempe-Lake St. John Levee, and the Cottage-Kempe Levee, both in the lower Tensas Levee District, State of Louisiana, on the main stem of the Mississippi River.

6. That the rights of way for the levee foundations and the levees which complainant company has obligated itself to construct under the contracts referred to in paragraph 5 hereof, have been provided by the State of Louisiana, [fol. 30] or the Tensas Levee District, to the United States Government without cost to the latter.

7. That the United States Government has no proprietary interest in the aforesaid rights of way, nor in the levees either before or after their completion, but has exclusive jurisdiction over the design, location, and construction thereof as relates solely to results, and is solely responsible for the cost of such construction.

8. That complainant's suit is a civil action and involves a sum in excess of $3000, exclusive of interest and costs.

9. That this section involves the construction, meaning and effect of the provisions of Act 6 of the Legislature of Louisiana of 1928, as amended by Act 8 of 1930 and Act 16 of 1932, and Act 1 of the Extra Session of the Legislature of Louisiana of 1930, the latter being in fact an amendment to the Constitution of the State of Louisiana duly ratified by the qualified electors of said State at an election held November 4, 1930.

10. That the aforesaid statutes are alleged to be in conflict with the "due process" clause of the 14th Amendment to the Constitution of the United States; and repugnant to the "interstate commerce" clause of said Constitution, being Art. 1, Sec. 8, Cl. 3, thereof.

11. That the aforesaid statutes are alleged to be in conflict with Art. 1, Section 2 of the Constitution of Louisiana, being the "due process" clause of the said Constitution, and with Article III, Sec. 16 of said Constitution providing that every law shall embrace but one object, and shall have a title indicative of such object.

12. That the contracts entered into by complainant company with the United States Government, and referred to in paragraph 5 hereof, were entered into under authority of Acts of Congress of May 15, 1928, February 23, 1931, and

July 14, 1932, and are the Standard Government Form of Contract for such construction work.

13. That all shipments of gasoline which complainant company has used and will use in the performance of said contracts have been and will be made from points outside the State of Louisiana to points within said State.

14. That the equipment used by complainant company in performing the work under its aforesaid contracts, such as dragline machines, tractors, tanks, graders and wagons, constitutes the private property of complainant company, acquired with its own funds prior to the date of the aforesaid contracts, with the exception of possible minor replacements, and is the same, or similar equipment as is used by it in performing similar work either public or private.

15. That the gasoline which complainant company has imported and will import into Louisiana was and will be imported by complainant for its use in the State of Louisiana exclusively in performance of its work under the contracts referred to in paragraph 5 hereof.

[fol. 31] 16. That gasoline as defined by the Acts of the State of Louisiana, aforesaid, is essential to the operation of draglines, tractors, trucks, graders and other equipment used by complainant company in performance of its said contracts with the United States Government, but that the selection by complainant corporation of the type of machinery requiring the use of gasoline to operate is not a requirement of the United States Government under the contracts aforesaid.

17. That such gasoline as it expects to import into Louisiana during the life of the aforesaid contracts, is to be stored in Louisiana by complainant and withdrawn from storage by it as necessity requires for exclusive use on the work which complainant has contracted to perform under the contracts referred to in paragraph 5 hereof.

18. That such gasoline as complainant company has already imported, or which it may hereafter import into Louisiana during the life of the aforesaid contracts, has and will be stored and used in Louisiana by complainant company exclusively for domestic consumption in performance of

its aforesaid contracts, such withdrawals from storage and use being made as necessity and occasion require, and that none of said gasoline has been or is now, or will be, used on or over the public highways and bridges of the State of Louisiana.

19. That complainant company, in connection with its bid on each of such contracts, was required to and did submit to proper representatives of the United States Government a list of machinery which it proposed to use on such contracts, respectively, if same should be awarded to it, which machinery consisted of draglines, tractors, trucks, et cetera.

20. That the contracts referred to in paragraph 5 hereof were obtained by complainant from the United States by competitive bidding, on the basis of award to the lowest responsible bidder.

21. That complainant company's contract for the construction of what is known as the Kempe-Lake St. John Levee involves the placing of approximately 9,000,000 cubic yards of earthwork, for which complainant's low bid of 14.81 cents per cubic yard, place measurement, was accepted, the total price approximating $133,290.00.

22. That complainant company's contract for the construction of what is known as the Cottage-Kempe Levee, involves the placing of approximately 4,280,000 cubic yards of earth-work, for which complainant's low bid of 16.45 cents per cubic yard, place measurement, was accepted, the total price approximating $704,060.00.

23. That in the execution of said contracts complainant company is obligated to furnish all labor and materials, and perform all work required to construct the aforesaid levees, and obligates itself to perform said work in strict accordance with specifications, schedules and drawings prepared by the Department of Engineers, U. S. Army, all of which are made a part of said contract.

[fol. 32] 24. That all labor or assistants so furnished and employed by complainant company on the aforesaid work are under the control of complainant company, except that reservation is made of the right of the contracting officer of the United States to require the complaint company to dis-

miss from the work such employee as the aforesaid contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

25. That complainant company shall give personal supervision to the work, or have a competent foreman or superintendent, satisfactory to the contracting officer of the United States, on the work at all times during progress, with authority to act for complainant.

26. That complainant company, under the terms of its aforesaid contracts with the United States, is obligated, without additional expense to the Government, to obtain all required licenses or permits, and be responsible for all damages to persons or property that occur as a result of complainant company's fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed, paid for by the Government on partial estimates, until completion and final acceptance of the work.

27. That complainant company has not obligated itself, nor is it obligated under the terms of the contracts referred to in paragraph 5 hereof, to reimburse or return to the United States Government any tax, or portion thereof, which complainant company may be relieved from paying to the State of Louisiana as a result of this suit.

28. That the gasoline used and expected to be used by complainant company in Louisiana is and will be imported by it wholly from the States of Arkansas and Texas in railroad tank cars; that such gasoline is and will be unloaded from such tank cars by complainant company into storage tanks of said company situated on the rights of way of the levees which complainant has contracted with the United States Government to construct, and into storage tanks of complainant company situated at Newellton, Louisiana, and from thence transported to other storage tanks of said company, located on said rights of way, and that said gasoline is and will be thereafter withdrawn from said storage tanks and used exclusively upon the public work aforesaid as need and occasion therefor arises, and

that no tax on said gasoline has been paid to the State of Louisiana by complainant company.

29. That complainant company will require between the date of filing its bill of complaint herein on November 2, 1932, and the completion of said contracts ten car-loads of gasoline containing approximately 8000 gallons each which it has purchased and agreed to purchase for shipment to it as needed from points outside the State of Louisiana.

[fol. 33] 30. That on and prior to October 29, 1932, complainant company had purchased in the State of Arkansas and had shipped to it at Newellton, in the Parish of Tensas, State of Louisiana, a certain car-load of gasoline consisting of 8,162 gallons contained in Car No. GATX-2795, and had purchased in the State of Texas and has shipped to it at Newellton, in the Parish of Tensas, State of Louisiana, 8,087 gallons of gasoline contained in Car No. NATX-15162; that all of said gasoline in both of said cars was purchased for use in performance of two contracts; that on said date, October 29, 1932, the State of Louisiana, acting through respondent, Alice Lee Grosjean, in her official capacity as Supervisor of Public Accounts, instituted suit against complainant company for taxes, penalties and costs alleged to be due under the statutes aforesaid and caused said two car-loads of gasoline to be seized under attachment to secure payment of the sum claimed; that complainant company was compelled to and did enter into bond as provided by law to secure release of said gasoline so held in attachment; that unless restrained in this proceeding respondent, Alice Lee Grosjean, in her official capacity proposes to continue her efforts to collect said tax.

It is agreed that the foregoing statement correctly presents to the Court all admitted questions of fact and all controverted issues of law relating to the transactions forming the subject matter of this litigation, and that both complainant and defendant reserve the right, should either deem proper, to submit supplemental proof on matters not covered by the foregoing statement and not inconsistent therewith, subject to the right of either party to interpose all legal objections thereto.

In testimony of all of which undersigned counsel for both complainant and defendants have hereunto signed, at the

City of New Orleans, Orleans Parish, Louisiana, on this Twenty-eight (28th) day of the month of November, A. D., 1932, after due reading of the whole.

(Sgd.) D. K. Woodward, Jr., Breazeale & Sachse, for Complainants. (Sgd.) Gaston L. Parterie, Attorney General (D.); (Sgd.) Justin C. Daspit, Special Ass't Attorney General; (Sgd.) Peyton R. Sandoz, Special Ass't Attorney General, for Defendants.

[fol. 34] EXHIBIT "D-3", BEING STANDARD GOVERNMENT FORM OF CONTRACT—Filed November 28th, 1932

Standard Form No. 23.
Approved by the President Nov. 19, 1926.
Contract dated Aug. 5, 1932.
W 1096, eng. 2178.

Standard Government Form of Contract

(Construction)

War (Engineer Department at Large), U. S. Engineer Office, (Department) Second New Orleans District

Trinityfarm Construction Company (Contractor)

Contract for Kempe-Lake St. John Levee, Item R 674-A, Item R 674-B. Amount: $59,240.00, $74,050.00—$133,290.00 (Approximately).
Place: Lower Tensas Levee District.
Date of Receipt: 8/18/32.

Aug. 19 to 31, Inc.	13 days
Sept., Oct., Nov., Dec. & Jan.	153 days
Feb. 14, Inc.	14 days
Time Up Feb. 15, 1933	180 days

Contract for Construction

This contract entered into this fifth day of August, 1932, by the United States of America, hereinafter called the Government, represented by the contracting officer execut-

ing this contract, and Trinityfarm Construction Co., a corporation organized and existing under the laws of the State of Delaware, of the City of Dallas, in the State of Texas, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

Article 1. Statement of Work.—The contractor shall furnish all labor and materials and perform all work required for the construction of Kempe-Lake St. John Levee, Item R 674-A, containing approximately four hundred thousand (400,000) cubic yards and Item R 674-B containing approximately five hundred thousand (500,000) cubic yards, both situated in the Lower Tensas Levee District.

[fol. 35] For the consideration of fourteen and eighty-one one-hundreds (14-81) cents per cubic yard; place measurement, in strict accordance with the specifications, schedules and drawings, all of which are made a part hereof and designated as follows: Engineer Department, U. S. Army, Standard Specifications for Levee Work, No. 32253, dated June 16, 1932, and drawing entitled Items R 674 A and B. and R 674 E, F, & G, "Kempe-Lake St. John Levee", file No. L-8-2284, A, B, C, D and E.

The work shall be commenced as provided for in paragraph 2 of the specifications attached hereto and made a part hereof, and shall be completed within the time fixed for completion in paragraph 34 of said specifications.

Article 2. Specifications and Drawings.—The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

Article 3. Changes.—The contracting officer may at any time by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall [fol. 36] be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. Changed Conditions.—Should the contrator encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The Contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 5. Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 6. Inspection.—(a) All material and workmanship (if not otherwise designated by the specifications)

shall be subject to inspection, examination and test by Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with porper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

[fol. 37] (c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 per cent shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the

specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

Article 7. Materials and Workmanship.—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of quality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval [fol. 38] full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

Article 8. Superintendence by Contractor.—The contractor shall give his personal superintendence to the work or have a competent foremen or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

Article 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part

thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, act of the Government, fires, floods, epidemics, quarantine, restrictions, strikes, freight embargoes and unusually severe [fol. 39] weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

Article 10. Permits and Care of Work.—The contractor shall, without additional expense to the Government, obtain

all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Article 11. Eight-hour Law—Convict Labor.—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work, contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1912 (37 Stat. 137) relating to hours of labor.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article 12. Covenant Against Contingent Fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contrtct or in its discretion to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made [fol. 40] through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13. Other Contracts.—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer.

The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Article 14. Officials not to Benefit.—No Member or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contract shall diligently proceed with the work as directed.

Article 16. Payments to Contractors.—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptances of all work covered by the contract: Provided however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, that on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

[fol. 41] (c) All material and work covered by partial payments be made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsi-

bility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fullfillment of all of the terms of the contract.

(d) Upon completion and acceptances of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Article 17. Additional Security.—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 18. Definitions.—(a) the term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

Article 19. Alterations.—The following changes were made in this contract before it was signed by the parties hereto: ——.

In Witness Whereof the parties hereto have executed this contract as of the day and year first above written.
[fol. 42] (Sgd.) The United States of America, by J. N. Hodges, Lieut. Col., Corps of Engineers, U. S. Army. (Signed) Trinityfarm Construction Co. (Contractor), by J. D. Kirvem, Vice-President, 1507 Santa Fe Bldg., Dallas, Texas.

Two witnesses:

(Signed) C. C. Middleton, (Signed) C. L. Miller.

I, D. K. Woodward, Jr., certify that I am the Assistant Secretary of the corporation named as contractor herein; that J. D. Kirven, who signed this contract on behalf of the contractor, was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

(Signed) D. K. Woodward, Jr., Assistant Secretary.
(Seal.)

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, —— ——, who signed this contract for the —— had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

—— ——, Contracting Officer.

This contract is authorized by the acts of May 15, 1928, and February 23, 1931.

Directions for Preparation of Contract

1. This form shall be used for every formal contract for the construction or repair of public buildings or works, but its use will not be required in foreign countries.

2. There shall be no deviation from this standard contract form, except as provided for in these directions, without prior approval of the Director of the Bureau of the Budget obtained through the Interdepartmental Board of Contracts and Adjustments. Where interlineations, deletions, additions or other alterations are permitted, specific notation of the same shall be entered in the blank space following the article entitled "Alterations" before signing. This article is not to be construed as general authority to [fol. 43] deviate from the standard form. Deletion of the descriptive matter not applicable in the preamble need not be noted in the article entitled "Alterations".

3. The blank space of Article 1 is intended for the insertion of a statement of the work to be done, together with place of performance, or for the enumeration of papers which contain the necessary data.

4. If it is deemed necessary to include an article on Patents the Invitation to Bidders shall so state and the following article be used:

Article. Patents.—The contractor shall hold and save the Government, its officers, agents, servants and employees, harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article or appliance furnished or used in the performance of this contract, excepting patented articles required by the Government in its specifications, the use of which the contractor does not control.

5. Where only one payment is contemplated, upon completion of the contract, all except paragraph (d) of Article 16, "Payments to Contractor", must be stricken out.

6. If approval of the contract is required before it shall become binding the following article must be added:

Article. Approval.—This contract shall be subject to the written approval of —— and shall not be binding until so approved.

Contracts subject to approval are not valid until approved by the authority designated to approve them, and the contractor's copy will not be delivered nor any distribution made, until such approval. All changes and deletions must have been made before the contract is forwarded for approval.

7. The number of executed copies and of certified copies, designation of disbursing officer, statement of appropriation, amount of bond, designation of place of inspection, as well as other administrative details, shall be as directed by the department to which the contract pertains.

8. All blank spaces must be filled in or ruled out. The contract must be dated, and the bond must bear the same or subsequent date.

[fols. 44-55] 9. An officer of a corporation, a member of a partnership or an agent signing for the principal, shall place his signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the contractor.

10. If the contractor is a corporation, one of the certificates following the signatures of the parties must be executed. If the contract is signed by the secretary of the corporation, then the first certificate must be executed by some other officer of the corporation under the corporate

seal, or the second certificate executed by the contracting officer. In lieu of either of the foregoing certificates there may be attached to the contract copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

11. The full name and business address of the contractor must be inserted, and the contract signed with his usual signature. Typewrite or print name under all signatures to contract and bond.

12. The contracting officers must fill in the citation of the act authorizing the contract as indicated at the end of the last page of the contract.

13. The Invitation, Bid, Acceptance and Instructions to Bidders are not to be incorporated in the contract.

14. The specifications should include a paragraph stating the amount of liquidated damages that will be paid by the contractor for each calendar day of delay, as indicated in Article 9 of the contract.

[fol. 56] EXHIBIT ON BEHALF OF DEFENDANT, BEING AFFIDAVIT OF J. D. KIRVEN—Filed Nov. 28, 1932

U. S. DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

#271

TRINITYFARM CONSTRUCTION CO.

v.

ALICE LEE GROSJEAN, Supervisor, et als.

STATE OF TEXAS,
County of Maverick, ss:

Before me, the undersigned authority, on this day personally appeared J. D. Kirven, to me well known and known to me to be a credible citizen of Ellis County, Texas, who being by me first duly sworn, on his oath deposes and says as follows:

1. That he is Vice-President, Director and General Manager of Trinityfarm Construction Company, a private cor-

poration, complainant in Cause No. 271 on the Docket of the District Court of the United States for the Eastern District of Louisiana styled Trinityfarm Construction Company vs. Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, et al.

2. That this affidavit is made and executed for the purpose of being offered in evidence upon hearing of the above styled and numbered cause.

3. That affiant is General Manager of said Corporation and has been since its organization and knows of his own knowledge, through personal participation therein, the manner in which bids of said corporation for work to be performed for the United States Government have been and will be prepared and computed.

4. That Trinityfarm Construction Company uses in its operations a large amount of power-driven machinery and that gasoline is essential to the operation of all such machinery.

5. That in determining the amount of its bid on any piece of work upon which the United States Government has called for bids the officers and directors of Trinityfarm Construction Company compute the actual cost of comp-eting [fol. 57] such work, divide the sum total of such cost by the number of cubic yards required to be moved under the proposed contract and add to the quotient resulting the profit per cubic yard which is deemed fair and reasonable under the circumstances of the particular case. The sum so obtained constitutes the bid price of said Corporation.

6. That gasoline is used in large amount in the performance of such contracts and its cost delivered on the job is a material item of expense included in determining the cost of performing any job upon which a bid is submitted.

7. That in submitting its bids to the United States Government on the Kempe-Lake St. John Levee and on the Cottage Kempe Levee the officers and directors of said corporation included in the cost thereof the cost of gasoline necessary to perform the work required.

8. That the cost of such gasoline was calculated in compiling such bids on the basis of purchase at wholesale in carload lots without addition of any sum whatever to cover

excise taxes claimed by the State of Louisiana for the privilege of using such gasoline in the performance of such work.

9. That the bids submitted by said corporation to the United States Government for construction of each of said levees would have been proportionately higher than the bid actually submitted if such excise taxes had been included in the cost of said gasoline.

10. That in future bids which such corporation contemplates submitting to the United States Government the cost of gasoline necessary in proposed construction will be included as heretofore, and if it be held that the State of Louisiana is entitled to collect an excise tax for the use of such gasoline upon such work the bid of said corporation will be proportionately higher than it would be is such tax were not imposed.

Further, affiant saith not.

(Signed) J. D. Kirven.

Subscribed and sworn to before me by J. D. Kirven this 26th day of November, A. D. 1932. (Signed) Signature Illegible, Notary Public in and for Maverick County, Texas. My commission expires June 1st, 1933. (Seal.)

[fol. 58] AFFIDAVIT OF JUSTIN C. DASPIT, MARKED EXHIBIT D-2—Filed Nov. 28, 1932

STATE OF LOUISIANA,
Parish of East Baton Rouge:

Before me, the undersigned authority, personally came and appeared Justin C. Daspit, to me well and personally known, who, being first sworn by me, did depose and say:

That he was, on August 27, 1930, and for some years prior thereto, an Assistant Supervisor of Public Accounts of the State of Louisiana, and is presently counsel for said Department.

That a part of his duties as such official was to enforce the statutes of the State of Louisiana relating to a tax on gasoline and motor fuel.

That it was the policy of the Supervisor of Public Accounts at that time, as well as at the present time to regard contractors with the United States Government for levee construction work as independant contractors, and not as agencies or instrumentalities of the United States Government, this policy being predicated upon the construction placed upon said statutes by the office of Supervisor of Public Accounts since the enactment of the first gasoline tax statute by the Legislature of Louisiana in the year 1921, being Act 81 of the Legislature of said state of that year, and maintained and adhered to by reason of a decision of the Attorney General of Louisiana rendered to affiant in his capacity as Assistant Supervisor of Public Accounts of Louisiana on August 27, 1930, and published in the "Opinions of the Attorney General of Louisiana", for the biennial period commencing May 1, 1930 and ending April 30, 1932, at page 203 thereof, a copy of which aforesaid opinion is hereto annexed and made a part hereof and marked "Exhibit A".

Affiant avers that in pursuance of the aforesaid established policy of the Supervisor of Public Accounts of Louisiana to regard levee contractors, constructing levees under contract with the United States Government, as independent contractors and not as agencies or instrumentalities of the United States, and further in pursuance of the aforesaid ruling of the Attorney General of Louisiana hereinabove referred to, an application of Trinityfarm Construc-
[fol. 59] tion Co. (complainants in Suit No. 271, in equity, —filed in the U. S. District Court for the Eastern District of Louisiana, against Alice Lee Grosjean, Supervisor of Public Accounts of Louisiana, et al.,) for a refund of gasoline taxes paid by it to the State of Louisiana during the period from December 1, 1930 to June 30, 1932, was denied for the reasons given in a letter addressed by affiant to said corporation as per carbon copy hereto annexed and marked "Exhibit B", and as per carbon copy of a letter written by affiant to said corporation on August 20, 1932, hereto annexed as "Exhibit C".

That the aforesaid original application for a refund, filed by the Trinityfarm Construction Co., as aforesaid, and supported by a sworn statement of one C. C. Middleton, purporting to be the Secretary-Treasurer of said Trinity-

farm Construction Co., is hereto annexed and marked "Exhibit D".

Affiant further avers that the aforesaid annexed documents evidence that the aforesaid Trinityfarm Construction Company had paid the taxes on gasoline consumed by it in the State of Louisiana on other levee construction work contracted with the United States Government to be done by it in Louisiana prior to the dates of its respective present contracts with the United States Government, to-wit: July 16, 1931 and August 5, 1932, and that it therefore had both actual and constructive knowledge and notice that the aforesaid taxes should be incorporated in the price of its aforesaid bids for the levee construction work aforesaid as a part of the basic cost of said work.

(Signed) Justin C. Daspit.

Sworn to and subscribed before me, at Baton Rouge, Louisiana, this 26th day of November, 1932. (Signed) J. Elton Huckabay, Notary Public. (Seal.)

[fol. 60] EXHIBIT ON BEHALF OF DEFENDANT, BEING AFFIDAVIT OF WILLIAM A. COOPER—Filed January 19, 1933

STATE OF LOUISIANA,
Parish of East Baton Rouge:

Before me, the undersigned authority, personally came and appeared William A. Cooper, a resident of the City of Baton Rouge, East Baton Rouge Parish, Louisiana, to me well and personally known, who being first sworn by me, did depose and say:

1. That he is now, and has been since the incumbency of Miss Alice Lee Grosjean as Supervisor of Public Accounts, the Assistant Supervisor of Public Accounts of the State of Louisiana, in direct charge of all tax collections.

2. That in his aforesaid official capacity he has had, and now has, active charge, among other duties, of enforcing collection of the so-called Gasoline Tax Laws of the State of Louisiana, levied under authority of the Constitution of said State, affiant particularly referring to Act 6 (E. S.)

1928, as amended, and the Constitutional Article of the State duly adopted, and submitted as Act 1 (E. S.) 1930.

3. That the revenues of the State of Louisiana under the laws aforesaid approximate a minimum monthly average of Seven hundred thousand ($700,000) Dollars.

4. That in pursuance of the laws aforesaid the Supervisor of Public Accounts of Louisiana is required to make, and does make, within the first five days of each calendar month after the receipt of such taxes from the taxpayers, a settlement with the Treasurer of the State of Louisiana of all the aforesaid taxes collected during the preceding calendar month.

5. That in making such settlements the Supervisor of Public Accounts makes proper deduction of any and all amounts which may have been refunded to taxpayers under the provisions of Section 14 of the aforesaid Act 6 (E. S.) of 1928, as amended, and Section 14 of the aforesaid Constitutional Article generally known and referred to as Act 1 (E. S.) of 1930.

6. That the amount of funds in the hands of the Supervisor of Public Accounts of Louisiana, at the end of each month, and before settlement with the State Treasurer, and representing collections of the aforesaid so-called Gasoline Taxes of Louisiana, is at all times sufficient in amount [fol. 61] to meet any legitimate claim for refund of the taxes aforesaid, even up to the amount of total tax collections if necessary.

7. That by reason of the fact that a considerable number of gasoline tax debtors in Louisiana are not operating under bond, but pay the gasoline taxes in cash, there is always on hand with the Supervisor of Public Accounts, even immediately succeeding the monthly reports to the State Treasurer, a sum in cash aggregating a monthly minimum average of Twelve thousand ($12,000) Dollars.

8. That in instances where an unliquidated claim for refund of taxes is pending before monthly settlement by the Supervisor of Public Accounts with the Treasurer of the State, and which has not been satisfactorily proved or established by the claimant taxpayer before the date of settlement by the Supervisor with the Treasurer has arrived,

it is the policy of the Supervisor of Public Accounts to withhold in said settlement with the State Treasurer, an amount sufficient to pay any outstanding claim for refund of taxes which has not yet been satisfactorily established or proved, to the end that prompt payment of such claim may be effected immediately upon establishment of its validity and correctness.

(Signed) W. A. Cooper.

Sworn to and subscribed before me, at the City of Baton Rouge, Louisiana, on this 16th day of the month of January, A. D. 1933. (Sgd.) H. Carey Comish, Notary Public. (Seal.)

[fol. 62] In United States District Court, Eastern District of Louisiana, Baton Rouge Division

No. 271

Trinityfarm Construction Company

vs.

Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, et al.

Decree Granting Preliminary Injunction—Filed Dec. 17/32

This cause came on for hearing on a former day on the application of plaintiff for the issuance of a preliminary injunction and was argued and submitted upon the pleadings and an agreed statement of facts and upon the affidavits filed in the cause by the respective parties, whereupon the Court took time to consider and now being advised.

It is ordered, adjudged and decreed that a preliminary injunction issue as prayed for in said bill conditioned upon the plaintiff furnishing a bond approved by the Court in the sum of Six Thousand Dollars ($6,000.00).

New Orleans, Louisiana, December 7, 1932.

(Signed) Rufus E. Foster, U. S. Circuit Judge.
(Signed) Wayne G. Borah, U. S. District Judge.
(Signed) Allen Cox, U. S. District Judge.

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CALLING CASE FOR REARGUMENT—Feb. 4, 1933

This cause having been heretofore heard before the Court, composed of Judges Foster, Cox & Borah, and the Court desiring that a reargument be had in the above cause, and that all parties in interest be duly notified thereof;

It is Ordered that the above cause be reargued, the date of said reargument to be hereafter fixed and that all parties in interest be notified thereof.

[fol. 64] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

No. 271

TRINITYFARM CONSTRUCTION COMPANY

versus

ALICE LEE GROSJEAN, Supervisor of Public Accounts of the State of Louisiana, et al.

Breazeale & Sachse and D. K. Woodward, Jr., Esqs., Counsel for Plaintiff.

Gaston L. Porterie, Attorney General; Peyton R. Sandoz and Justin C. Daspit, Special Assistant Attorneys General, Counsel for Defendants.

Before Foster, Circuit Judge, and Borah and Cox, District Judges

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed June 12, 1933

BORAH, District Judge:

This suit was brought against defendants, state tax officials, to enjoin the collection of a state excise tax levied upon the use of gasoline by plaintiff within the State. On

motion of the attorneys for the plaintiff, Trintyfarm Construction Company, a District Court of three judges was organized and convened to hear its application for an interlocutory injunction, a preliminary restraining order having been granted without notice because of the danger of irreparable injury resulting by a delay until notice could be given and a hearing had on said application for an interlocutory injunction. After a full hearing, at which evidence was introduced in the form of affidavits, and argument had by counsel, the court issued an interlocutory injunction in accordance with the prayer of the bill. The case is now before the court for trial hearing on the merits.

Findings of Fact

The verified pleadings, agreed statement of facts and undisputed affidavits filed herein show that the plaintiff is a private corporation organized under the laws of Delaware and is presently engaged in the construction of levees within the State of Louisiana under contracts with the United States of America. For this purpose the plaintiff has imported certain gasoline in tank car lots from other states which it places in a central storage tank from which [fol. 65] it is distributed to storage tanks located on its rights of way in proximity to the machine in which it is used. Plaintiff also proposes to import additional gasoline to be handled in like manner. It further appears that none of said gasoline has been, is now or will be used on or over the public highways and bridges of the State of Louisiana, but all of it is being used exclusively on the work which plaintiff has contracted to perform under the contracts and upon rights of way furnished by the State of Louisiana or the Tensas Levee District of the United States for the construction of levees.

The statutes of Louisiana complained of (Act 6 of 1928 as amended by Act 8 of 1930 and Act 16 of 1932 and Act 1 of the Extra Session of 1930, the latter being in fact an amendment to the Constitution of Louisiana) levy a cumulative tax of five cents per gallon upon all gasoline or motor fuel "sold, used or consumed in the State of Louisiana for domestic consumption" and requires that the aforesaid tax shall be collectable from "all persons, firms, corporations or association of persons, engaged as dealers in the handling, sale, or distribution of such products within the State

of Louisiana." The term "dealer" is defined to mean "any person, firm, corporation or association of persons who produces, refines, manufactures, blends or compounds gasoline * * * for sale to the jobber or consumer, or to the persons * * * who, in turn, sell to the jobber or consumer. The term 'dealer' is further defined to mean the person, firm, corporation or association of persons who imports such gasoline * * * from any other State or foreign country for distribution, sale or use in the State of Louisiana." In addition the statutes provide that "on all gasoline * * * imported from other States and used by him, the 'dealer' as thus defined shall pay the tax on the amount so imported and used, the same as if it had been sold for domestic consumption."

The plaintiff contends that it is not a dealer in gasoline and that the gasoline used by it is an instrumentality of interstate commerce and cannot be taxed by the State for so to do would be to lay a burden upon such commerce which is prohibited by the commerce clause of the Federal Constitution. Exemption is also claimed for the further reasons: (1) that the tax is imposed upon an agency or instrumentality of the United States; and (2) that the statutes are violative of the due process and equal protection clauses of the Federal and State Constitutions.

[fol. 66] Conclusions of Law

From the findings of fact the court has reached the legal conclusion that plaintiff is chargeable with the taxes levied under the Constitutional provisions and statute above referred to on gasoline imported into Louisiana for exclusive use by it within the State of Louisiana.

The tax which plaintiff is called upon to pay is an excise and not a property tax, the tax being laid not upon the gasoline but upon the right or privilege of selling, using or consuming it.

A State may tax the "use" to which gasoline is put in withdrawing it from storage within the State and it is at the time of withdrawal alone that "use" is measured for the purpose of the tax as the stored gasoline is deemed to be "used" within the State and therefore subject to the tax when it is withdrawn from the tanks. Edelman et al.

v. Boeing Air Transport, Inc., (decided by U. S. Supreme Court April 17, 1933.)

The plaintiff company is not such a governmental instrumentality, as exempts it and its property from liability for taxes under the revenue laws of the State. If it may be said to be an instrumentality of the government, its relations to the government are nevertheless purely contractual. It does not exercise governmental functions. It undertakes to construct according to plans and specifications adopted by officials of the government. It is organized for that and similar purposes and its primary object is to comply with the conditions of the contract for the profit to be made in so complying.

While plaintiff does not state wherein its rights under the due process clauses referred to are impinged, we assume it is because it is required by the statutes in controversy to pay an excise tax as "dealer" based on the number of gallons of gasoline handled, distributed and consumed by it in Louisiana as the privilege of engaging as such "dealer" in the handling, distribution and use of that commodity in the State, and that the methods provided by said statutes for the enforcement and collection of the excises imposed by them are so summary and exacting as not to constitute "due process of law"; however, there is no substance in the objection as the precise point has been considered and disposed of by the United States Supreme Court in two [fol. 67] adjudicated cases. See Bowman v. Continental Oil Co., 256 U. S. 642; Hart Refineries v. Harman, 278 U. S. 499.

The order heretofore entered granting an interlocutory injunction is recalled, and the decree for injunction denied, and the bill of complaint dismissed. Appropriate orders may accordingly be entered.

[fol. 68] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA (BATON ROUGE DIVISION)

In Equity. No. 271

TRINITYFARM CONSTRUCTION COMPANY, Plaintiff,

versus

ALICE LEE GROSJEAN, Supervisor of Public Accounts of Louisiana, et al., Defendants

FINAL DECREE—Filed June 15, 1933

This cause came on for hearing on application of plaintiff for an interlocutory injunction on November 28, 1932, and was submitted to the Court on briefs, and upon the pleadings and an agreed statement of facts, and upon affidavits filed in the cause by the respective parties, and upon such hearing the Court issued an interlocutory injunction in accordance with the prayer of the bill.

Thereafter, to-wit: On January 19, 1933, this cause was submitted to the Court for consideration on the merits, upon the record as made as made up, after argument but without submission of additional briefs; and thereafter, to-wit: On March 16, 1933, on the Court's own motion, a reargument of the cause was had.

Whereupon the Court took time to consider and now being advised and for the reasons assigned in the written opinion on file;

It is ordered, adjudged and decreed that the order heretofore entered granting an interlocutory injunction be and the same hereby is recalled; that the plaintiff's prayer for injunction be and the same is hereby denied and that its bill of complaint herein be and the same is hereby dismissed, with costs.

New Orleans, Louisiana, June 15, 1933.

(Signed) Rufus E. Foster, Circuit Judge. (Signed) Allen Cox, District Judge. (Signed) Wayne G. Borah, District Judge.

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 14, 1933

Trinityfarm Construction Company, Plaintiff in the above entitled cause, feeling itself aggrieved by the final order or decree of the District Court entered on the 15th day of June, 1933, prays an appeal therefrom to the Supreme Court of the United States. The particulars wherein it considers the final order or decree erroneous are set forth in the Assignments of Error filed herewith, to which reference is made.

It prays that a transcript of the record, proceedings and papers upon which the final order or decree was made and entered may be duly authenticated and transmitted forthwith to the Supreme Court of the United States.

(Signed) D. K. Woodward, Jr., (Signed) Breazeale & Sachse, (Signed) H. Payne Breazeale, (Signed) Victor A. Sachse, Attorneys for Plaintiff.

[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 14, 1933

Comes now the plaintiff in the above-entitled cause and in connection with its petition for appeal files the following assignment of errors on which it will rely on its appeal to the Supreme Court of the United States from the final order or decree of the District Court entered June 1933.

The District Court erred:

1. In denying plaintiff's prayer for a permanent injunction.

2. In recalling the interlocutory injunction issued herein.

3. In dismissing plaintiff's bill of complaint.

4. In failing to hold that the contracts between plaintiff and the United States for the construction of levees on

the main stem of the Mississippi River are "Federal Instrumentalities."

5. In failing to hold that gasoline used by plaintiff exclusively in the performance of such Federal contracts is a part of plaintiff's equipment, and, as such, exempt from excise taxes sought to be levied by the State of Louisiana.

6. In failing to hold the excise tax complained of unconstitutional and void, as imposing a direct burden upon the performance by the Federal Government of its delegated powers.

[fol. 71] 7. In holding that the State of Louisiana may impose a direct burden upon the contracts between the United States and plaintiff by exacting from plaintiff payment of an excise tax for the privilege of using its equipment in the performance of such contracts.

8. In failing to hold that the statutes complained of, as administered by the State of Louisiana, are unconstitutional and void insofar as the same purport to levy an excise tax upon plaintiff for the privilege of using its gasoline wholly and exclusively in the performance of its contracts with the United States.

9. In failing to hold that the statutes complained of could have no application to gasoline used wholly and exclusively by plaintiff in the performance of its contracts with the United States, and that, if such application were intended, it was beyond the power of the State of Louisiana to levy such excise tax.

10. In holding that the State of Louisiana has power to levy and collect an excise tax from plaintiff for the privilege of using its gasoline solely in the performance of its contracts with the United States.

11. In holding plaintiff liable for payment of an excise tax for the privilege of using its gasoline solely in performance of its contracts with the United States.

12. In holding plaintiff liable for payment of the excise tax complained of when such tax is laid solely upon the use by plaintiff of its gasoline in performing its contracts with the United States.

13. In holding plaintiff to be a "dealer" in gasoline, and as such liable for the payment of an excise tax on gasoline, used exclusively and wholly by plaintiff in the performance of its contracts with the United States.

Wherefore said plaintiff prays, that said decree of June 1933, be reversed and set aside and that the injunction prayed for in this matter be issued and made permanent.

(Signed) D. K. Woodward, Jr., (Signed) Breazeale & Sachse, (Signed) H. Payne Breazeale, (Signed) Victor A. Sachse, Attorneys for Plaintiff.

[fols. 72-78] IN UNITED STATES DISTRICT COURT

In Equity. No. 271

TRINITYFARM CONSTRUCTION COMPANY, Plaintiff,

vs.

ALICE LEE GROSJEAN, Supervisor of Public Accounts of the State of Louisiana, Defendant

ORDER ALLOWING APPEAL—Filed July 14, 1933

In the above-entitled cause, the plaintiff having made and filed its petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court entered June 15, 1933, and having also made and filed Assignments of Error and Statement of Grounds of Jurisdiction, and having in all respects conformed to the statutes and rules of the Court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby allowed as prayed, upon the plaintiff giving bond in the sum of Twenty five Thousand ($25,000.00) Dollars, which bond shall serve for supersedeas and stay of judgment as well as for the costs of such appeal, returnable in forty (40) days from the date hereof, and the Clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which

the order or decree was made and entered to the Supreme Court of the United States.

Made and entered this 14th day of July, 1933.

(Signed) Rufus E. Foster, United States Circuit Judge. (Signed) Wayne G. Borah, United States District Judge. (Signed) Allen Cox, United States District Judge.

[fol. 79] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE TO ATTORNEY GENERAL OF LOUISIANA—Filed July 14, 1933

To Honorable Gaston L. Porterie, Attorney General of the State of Louisiana:

Pursuant to the provisions of Section 266 Judicial Code, Act March 3, 1911, as amended, you are hereby notified that the Trinityfarm Construction Company, plaintiff, has taken an appeal from the final order or decree of the District Court, entered June —, 1933, to the Supreme Court of the United States, and that the order allowing appeal makes the same returnable within forty (40) days from the date thereof.

(Sgd.) D. K. Woodward, Jr., Breazeale & Sachse, H. Payne Breazeale, Victor A. Sachse, Attorneys for Appellant.

Service of the foregoing notice and the receipt of a copy thereof are hereby acknowledged this 14th day of July, 1933.

(Sgd.) G. L. Porterie, Attorney General, State of Louisiana, by G. N. Wallace, First Assistant Attorney General.

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL TO GOVERNOR OF THE STATE OF LOUISIANA —Filed July 14, 1933

To Honorable Oscar K. Allen, Governor of the State of Louisiana:

Pursuant to the provisions of Section 266 Judicial Code, Act March 3, 1911, as amended, you are hereby notified

that the Trinityfarm Construction Company, plaintiff, has taken an appeal from the final order or decree of the District Court, entered June 15th, 1933, to the Supreme Court of the United States, and that the order allowing appeal makes the same returnable within forty (40) days from the date thereof.

(Signed) D. K. Woodward, Jr., Breazeale & Sachse, H. Payne Breazeale, Victor A. Sachse, Attorneys for Appellant.

Service of the foregoing notice and the receipt of a copy thereof are hereby acknowledged this 14th day of July, 1933.

(Signed) Oscar K. Allen, Governor of the State of Louisiana.

[fol. 81] Citation, in usual form, showing service on Peyton R. Sandoz, filed July 14, 1933, omitted in printing.

[fols. 82 & 82a] Bond on appeal for $25,000, approved and filed July 26, 1933, omitted in printing.

[fol. 83] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 14, 1933

The Clerk of the United States District Court for the Eastern District of Louisiana will please proceed to make up the transcript in the above numbered and entitled cause, including therein the following:

1. Plaintiff's original petition, affidavit and attached order of Court.
2. Defendant's original answer.
3. Original Agreed statement of facts and admissions submitted to the trial court by plaintiff and defendant, with attached contracts marked exhibits D-3 and D-4.
4. Affidavits of J. D. Kirven, Justin C. Daspit, without attached exhibits, and W. A. Cooper.
5. Decree of Court granting preliminary injunction.

6. Order of Court calling for reargument on final hearing.

7. Written reasons of court for judgment with particular reference to findings of facts and conclusions of law.

8. Decree of the Court.

9. Petition for appeal, assignment of errors and prayer for reversal and statement of grounds of jurisdiction of the United States Supreme Court, filed by plaintiff-appellant.

10. Order allowing appeal and fixing bond.

11. Notice of appeal, notice required by Rule 12 of the Supreme Court of the United States and written acknowledgment of service thereof on the Governor and Attorney General of Louisiana.

12. Citation of appeal addressed to defendant, appellee, Alice Lee Grosjean, Supervisor of Public Accounts of Louisiana, with attached acknowledgment of service and receipt of copy thereof, by attorney for defendant-appellee.

13. Bond of appeal with approval thereof.

14. This præcipe, with attached acknowledgment of service thereof on counsel for defendant-appellee, and attestation by said counsel that they have no request for additions thereto.

15. Your certificates.

(Signed) D. K. Woodward, Jr., (Signed) Breazeale & Sachse, (Signed) H. Payne Breazeale, (Signed) Victor A. Sachse, Counsel for Appellants.

[fol. 84] We hereby acknowledge service of the foregoing præcipe, and attest that he have no request for additions thereto.

Dated at New Orleans, Louisiana, on this 14th day of the month of July, A. D. 1933.

(Signed) Gaston L. Porterie, (Initialed) S., Attorney General of Louisiana; (Signed) Peyton R. Sandoz, Special Asst. Atty. General; (Signed) Justin E. Daspit, Special Asst. Atty, General, (Initialed) S., for Defendant-Appellee.

[fols. 85 & 86] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 87] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Aug. 17, 1933

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this cause are as follows:

Point 1. The contracts existing between the United States and appellant for the construction of levees on the main stem of the Mississippi River are means adopted by the Federal Government for carrying out its delegated powers, and the District Court erred in failing so to hold.

Point 2. The statutes complained of impose a direct burden upon the contracts existing between the United States and appellant and are, therefore, unconstitutional and void as applied to such contracts and the District Court erred in failing so to hold.

Point 3. The statutes complained of impose an excise tax upon appellant for the privilege of using gasoline owned by appellant wholly and exclusively in performance of appellant's contracts with the United States. Such tax is a direct burden upon the United States in the discharge of its delegated powers, which burden the State of Louisiana is without power to impose, and the District Court erred in failing so to hold.

Point 4. The State of Louisiana is without power to tax appellant for the privilege of using its property in performing its contracts with the United States, and the District Court erred in failing so to hold.

Point 5. Appellant is in no sense a dealer in gasoline, since it buys to use and does not buy to sell again, and since the tax is imposed only upon dealers it can not be legally imposed upon appellant; further, if appellant be considered a "dealer" under the provisions of such statutes, in as much as no indication of such definition is found in the title or caption of the statutes, to that extent they are in violation of the Constitution of the State of Louisiana, and the United States District Court erred in failing so to hold.

[fol. 88] And appellant further states that the entire record should be printed, save and except Exhibit D-4, be-

ing Standard Government Form on Contract, typewritten record pages 45 to 55, both inclusive, which, in so far as this case is concerned, is identical to Exhibit D-3, commencing on page 34.

D. K. Woodward, Jr., H. Payne Breazeale, Victor A. Sachse, Attorneys for Appellant.

Baton Rouge, La., August 14, 1933.

We hereby acknowledge service of the foregoing "Statement of points to be relied upon and designation of parts of record to be printed," and attest that we have no request for additional parts of the record to be printed.

G. L. Porterie, Attorney General, S.; Peyton R. Sandoz, Special Assistant Attorney General; Justin E. Daspit, S., Special Assistant Attorney General, Attorneys for Appellee.

[fol. 89] [File endorsement omitted.]

Endorsed on cover: File No. 37,958. E. Louisiana D. C. U. S. Term No. 355. Trinityfarm Construction Company, appellant, vs. Alice Lee Grosjean, Supervisor of Public Accounts for the State of Louisiana. Filed August 17, 1933. No. 355, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 355

TRINITYFARM CONSTRUCTION COMPANY,
APPELLANT,

vs.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS OF THE STATE OF LOUISIANA,
APPELLEE.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

STATEMENT OF JURISDICTION.

In compliance with Rule 12 of the Supreme Court of the United States, appellant submits herewith its statement showing the basis of the jurisdiction of this Court to entertain the appeal in the above-entitled cause:

A.

Statutes.

The statutory jurisdiction of the Supreme Court to review by direct appeal the order or decree here complained of is conferred by Section 266 of the Judicial Code, Act

March 3, 1911, c. 231, as amended by Act March 4, 1913, c. 160, and Act February 13, 1925, c. 229, and by Section 238 of the Judicial Code as amended by Act February 13, 1925, c. 229.

B.

Louisiana Statutes Validity of Which is Questioned.

The statutes of the State of Louisiana the validity of which are questioned are Act No. 6 of the Legislature of Louisiana for the year 1928, as amended by Act No. 8 for the year 1930, as amended by Act No. 16 for the year 1932, and Act No. 1 of the Extra Session of the Legislature of Louisiana for the year 1930.

Act No. 6 of 1928 is to be found on page 14 *et seq.* of the Acts of Louisiana for the Extra Session of 1928; Act 8 of 1930 is to be found on page 17 *et seq.* of the Acts of Louisiana for the year 1930; Act 16 of 1932 is to be found on page 112 *et seq.* of the Acts of Louisiana for the year 1932.

Act No. 6 of 1928, as amended, is an act to provide revenues for the public highways of the State of Louisiana by levying a tax of four cents per gallon on all gasoline or motor fuel sold, used or consumed in the State of Louisiana for domestic consumption; it provides that such tax shall be collectible from all persons, firms, corporations or associations of persons, engaged as dealers in the handling, sale or distribution of such gasoline within the State of Louisiana; it defines as "dealers" any person, firm, corporation or association of persons, who produces, refines, manufactures, blends or compounds gasoline or motor fuel for sale to the jobber or consumer, or to the persons, firms, corporations, or associations of persons who, in turn, sell to the jobber or consumer; it further defines as "dealers" any person, firm, corporation or asso-

ciation of persons who imports gasoline from any other State or foreign country for distribution, sale, or use in the State of Louisiana, and declares that the importer, so defined as a "dealer," shall pay the tax on the amount of gasoline so imported and used, the same as if it had been sold for domestic consumption; it provides for methods of collection, fines and penalties, and, in certain cases, confiscation of gasoline and other property as well as imprisonment for those violating the provisions of the act. It provides that the tax shall not apply to sales to the United States Government or any agency or department thereof. The title, the material portion of Section 1 and all of Section 2 of Act No. 6, as amended, read as follows:

"AN ACT

"To amend and reenact Section 1 of Act No. 6 of 1928, approved December 18, 1928, as amended by Act No. 8 of 1930, entitled 'An Act to provide revenues for the public highways of the State of Louisiana by levying a tax of four cents per gallon on all gasoline or motor fuel sold, used or consumed in the State of Louisiana for domestic consumption, as authorized by paragraph (A) Section 22, Article VI, of the Constitution of Louisiana, of 1921, as amended, defining motor fuel, fixing the time of collecting such tax and providing for the expense thereof, prescribing the manner and methods of enforcing payment, and fixing penalties for failure to make same, requiring all those engaged in the handling, selling, or distribution of gasoline or motor fuel to make such report of their business as may be necessary for the proper enforcement of this Act, providing that all said taxes collected under the provisions of this Act shall be credited to the General Highway Fund and expended for the purpose of the construction and maintenance of the system of State Highways and bridges, and for such other purposes as provided for

in paragraph (*a*), Section 22 of Article VI, of the said Constitution of Louisiana, and repealing all laws or parts of laws in conflict therewith,'' and adding seven new sections to be designated Section 7-A, Section 7-B, Section 7-C, Section 7-D, Section 7-E, Section 7-F, and Section 7-G, providing penalties for the enforcement thereof, and repealing all laws in conflict therewith.'

''SECTION 1. *Be it enacted by the Legislature of Louisiana,* That there is hereby levied a tax of four cents (4¢) per gallon on all gasoline, or motor fuel, sold, used or consumed in the State of Louisiana for domestic consumption, to be collected as hereinafter set forth * * *.''

''SECTION 2. The aforesaid tax of four cents per gallon shall be collectible from al persons, firms, corporations or associations of persons, engaged as dealers in the handling, sale or distribution of such products within the State of Louisiana, the method of collection to be as prescribed in Section 4 of this Act. The term 'dealer' as used in this Act is defined to mean any person, firm, corporation or associations of persons, who produces, refines, manufactures, blends or compounds gasoline or motor fuel for sale to the jobber or consumer, or to the persons, firms, corporations, or associations of persons who, in turn, sell to the jobber or consumer. The term 'dealer' is further defined to mean the person, firm, corporation or association of persons who import such gasoline or motor fuel from any other State or foreign country for distribution, sale or use in the State of Louisiana. On all gasoline or motor fuel imported from other States and used by him, the 'dealer' as thus defined shall pay the tax on the amount so imported and used, the same as if it has been sold for domestic consumption.''

Act No. 1 of the Extra Session of the Legislature of Louisiana for the year 1930, in so far as the issues presented by this case are concerned, is identical to the act

above described, except that it was a joint resolution of the Legislature intended to and has become an amendment to the Constitution of the State of Louisiana, and except that it imposes a tax of one cent per gallon and dedicates the revenue to a specific fund for the payment of bonds. It is to be found on page 5 of the Act of Louisiana for the Extra Session of 1930.

C.

Date of Decree and Application for Appeal.

The final decree sought to be reviewed was entered June 15, 1933 (R. 68). The petition for appeal was presented to aforesaid district court, with this statement, on July 14, 1933, and the order allowing appeal was entered July 14, 1933.

D.

Nature of the Case.

This cause was instituted by a bill in equity filed by Trinityfarm Construction Company seeking to enjoin Alice Lee Grosjean, Supervisor of Public Accounts, the official charged with the collection of taxes imposed by the acts above referred to, from collecting or attempting to collect the said tax on gasoline imported by Trinityfarm Construction Company into Louisiana from other States, in which other States the gasoline had been purchased by Trinityfarm Construction Company, for exclusive use in the construction of levees on the main stem of the Mississippi River, within the State of Louisiana, under contracts between plaintiff and the United States of America, and to further enjoin the said official from interfering with plaintiff in the performance of such contracts by suits, seizures, fines, imprisonment or otherwise. The specially constituted district court of three judges granted a temporary

restraining order without hearing; subsequently, after hearing, granted a preliminary injunction; subsequently, upon the case being set for trial on the merits, decided the case in favor of plaintiff and made the injunction final, but, thereafter requested a reargument of the case and, finally, on the 15th day of June, recalled the prelminary injunction issued herein and dismissed plaintiff's bill of complaint, holding the tax to be due and the statutes complained of to be constitutional.

E.

Cases Sustained Jurisdiction.

The following decisions are believed to sustain the jurisdiction of this Court:

Clark v. *Poor,* 274 U. S. 554, 47 S. Ct. 702, 71 L. Ed. 1199;

Interstate Busses Corporation v. *Blodgett,* 270 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 551;

Herkness v. *Irion,* 278 U. S. 92, 49 S. Ct. 40, 73 L. Ed. 198.

Respectfully submitted,

(Sgd.) D. K. Woodward, Jr.,
Breazeale & Sachse,
H. Payne Breazeale &
Victor A. Sachse,
Attorneys for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 355.

TRINITYFARM CONSTRUCTION COMPANY, *Appellant*,

vs.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS FOR THE STATE OF LOUISIANA.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

BRIEF FOR APPELLANT.

VICTOR A. SACHSE,
H. PAYNE BREAZEALE,
D. K. WOODWARD, JR.,
Attorneys for Trinityfarm Construction Co., Appellant.

GREEN, GREEN & JACKSON,
Of Counsel.

PRESS OF BYRON S. ADAMS. WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 355.

TRINITYFARM CONSTRUCTION COMPANY, *Appellant*,

vs.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS FOR THE STATE OF LOUISIANA.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

(Reported below: 3 F. Supp. 785.)

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Appellant, plaintiff below, filed its bill of complaint in the District Court of the United States for the Eastern District of Louisiana against appellee, defendant below, as Supervisor of Public Accounts of the State of Louisiana, her

agents and representatives, to enjoin appellee, her agents and representatives, from seeking to collect from appellant excise taxes upon gasoline used by appellant in performing certain levee construction contracts between appellant and the United States of America. (R. 1.)

The statutes of the State of Louisiana levying the taxes complained of are designated as Act No. 6 of the Special Session of 1928 as amended by Act 8 of 1930 as amended by Act 16 of 1932 and Act No. 1 of the Extraordinary Session of 1930, the latter act being in form an amendment to the state constitution.

The relevant portions of Act No. 6 are:

> "Section 1. Be it enacted by the Legislature of Louisiana, That there is hereby levied a tax of four cents (4c) per gallon on all gasoline, or motor fuel, sold, used or consumed in the State of Louisiana for domestic consumption, to be collected as hereinafter set forth.
>
> "* * * * * * *
>
> "Section 2. The aforesaid tax of four cents per gallon shall be collectible from all persons, firms, corporations or associations of persons, engaged as dealers in the handling, sale or distribution of such products within the State of Louisiana, the method of collection to be as prescribed in Section 4 of this Act. The term 'dealer' as used in this Act is defined to mean any person, firm, corporation or association of persons, who produces, refines, manufactures, blends or compounds gasoline or motor fuel for sale to the jobber or consumer, or to the persons, firms or corporations, or associations of persons who, in turn, sell to the jobber or consumer. The term 'dealer' is further defined to mean the person, firm, corporation or association of persons who imports such gasoline or motor fuel from any other State or foreign country for distribution, sale, or use in the State of Louisiana. On all gasoline or motor fuel imported from other States and used by him, the 'dealer' as thus defined shall pay the tax on the amount so imported and used, the same as if it has been sold for domestic consumption."

Act No. 1 of the Extraordinary Session of 1930 is identical in legal effect with Act No. 6, except as to the rate of levy and the allocation of the proceeds of the tax. The two statutes taken together purport and undertake to levy a tax of five cents per gallon on all "gasoline * * * sold, used or consumed in the State of Louisiana for domestic consumption."

Appellant, a Delaware corporation with appropriate charter powers, alleged that it had entered into contracts with the United States to construct two certain levees along the Mississippi River within the State of Louisiana; that it had purchased for the performance of such contracts a large amount of equipment including dragline machines, trucks, tractors, graders, wagons and gasoline; that such gasoline was purchased wholly outside the State of Louisiana and shipped in tank car lots in interstate commerce to appellant's storage tanks on Government-controlled levee right-of-way; that such gasoline was wholly consumed and used in performance of said contracts with the United States and that no portion thereof was used on the public roads, highways or bridges of the State of Louisiana.

Appellant alleged that appellee, her agents and servants, had seized two carloads of such gasoline under attachment and that they threatened to and would seize the remainder thereof unless restrained by order of court; that appellant was without adequate remedy at law and would suffer irreparable damage if relief were denied.

Appellant denied liability for the tax imposed on the ground that the same imposed a direct burden upon its contracts with the United States; that the statutes imposing such tax are unconstitutional, null and void in that the operation and effect thereof and of acts done and threatened pursuant thereto would be to burden, retard and impede operations of the General Government undertaken pursuant to its Constitution and Laws, and to deprive appellant of rights conferred thereby.

Prayer was for a temporary restraining order, a preliminary and a permanent injunction.

A temporary restraining order was granted as prayed for (R. 9) and a statutory court of three judges was convened.

Appellee filed her answer (R. 11) in which she admitted jurisdictional facts alleged by appellant but denied that appellant was without adequate remedy at law or that the statutes in question or any acts or things done pursuant thereto were violative of the Constitution or laws of the United States or of the State of Louisiana.

Appellee further denied that the gasoline in question was a part of appellant's equipment or that the State of Louisiana intended to impose any burden on the use by appellant of such equipment as it was necessary for appellant to employ in performing its Government contracts.

Appellee denied that the tax complained of was laid upon the use by appellant of its gasoline in performing its contracts with the United States and alleged on the contrary that such tax was levied upon appellant for the privilege of engaging as a "dealer" in the distribution, use or sale of gasoline in Louisiana; that the tax accrued when the gasoline imported by appellant came to rest in appellant's storage tanks, and that the ultimate use of such gasoline by appellant in performing its Government contracts was immaterial since the taxable status and situs of such gasoline was fixed prior to such use.

Answering affirmatively, appellee alleged upon information and belief that appellant had included the tax complained of in its costs; that it had not offered to restore or return to the Government any sum which it might save if relieved of paying such taxes; that it had not offered to do equity; that appellant's action was an effort to enrich itself at the expense of the State and of the United States and, if upheld, would constitute a fraud upon both.

Appellee further answered, in the alternative only, that the statutes in question had not been held void by any com-

petent court; that they were presumed to be valid and that appellant was charged with knowledge of the tax imposed; that its failure to include the amount of tax as part of the basic cost of work contracted to be done by it for the United States constituted lack of diligence and laches which should bar appellant's right to equitable relief.

An agreed statement of facts (R. 23) was filed admitting the existence of jurisdictional facts, the charter power of appellant, the making and existence of appellant's contracts with the Government pursuant to the Act of May 15, 1928, the importation by appellant of gasoline for use exclusively in performance of such contracts, the storage of such gasoline by appellant in its storage tanks at Newellton, Louisiana, and in other tanks belonging to appellant situated on Government levee right-of-way; the withdrawal by appellant, as needed, of such gasoline from its storage tanks and use thereof exclusively in performance of such contracts; that equipment used by appellant on such contracts, such as dragline machines, trucks, tractors et cetera, was its customary equipment acquired prior to the making of such contracts, that gasoline is an essential fuel for such equipment; that the selection by appellant of equipment requiring gasoline as fuel was not a requirement of the United States under such contracts, but that in making its bid to the Government upon each of such contracts appellant was required to and did submit to proper representatives of the Government a list of machinery which it proposed to use in performing such contracts, respectively, if awarded to it, which machinery consisted of draglines, tractors, trucks et cetera; that appellant has not obligated itself nor is it obligated by such contracts to reimburse or return to the United States any tax or portion thereof which it may be relieved from paying to the State of Louisiana as a result of this suit; and that appellee instituted suit for collection of the questioned tax and caused the two carloads of gasoline to be seized under attachment as alleged and

that, unless restrained in this proceeding, she proposes to continue similar efforts to enforce collection of such tax.

The following additional evidence was introduced:

(a) Standard Government Form of Contract between the United States of America and Trinityfarm Construction Company for construction of Kempe-Lake St. John Levee. (R. 29)

(b) Affidavit of J. D. Kirven, Vice-President, Director and General Manager of Trinityfarm Construction Company (R. 40) wherein affiant deposes that he has personal knowledge of the manner in which appellant prepares its bids for work to be performed for the United States Government; that appellant uses in its operations a large amount of power driven machinery in the operation of all of which gasoline is essential; that in determining the amount of appellants bid on any piece of work for the United States the actual cost of completing same is computed and divided by the number of cubic yards of material required to be moved and to the quotient so obtained is added a profit per cubic yard deemed fair and reasonable under the circumstances of the particular case, the sum resulting being the bid price of appellant; that gasoline is used in large amount in performing such contracts and its cost delivered on the job is a material item of expense included in determining the cost of any job upon which a bid is submitted; that the appellant's bids on the contracts involved in this suit included the cost of gasoline necessary to perform the work required; that the cost of such gasoline was calculated in compiling such bids on the basis of purchase at wholesale in carload lots without addition of any sum whatever to cover excise taxes claimed by the State of Louisiana for the privilege of using such gasoline in the performance of such work; that the bid of appellant to the United States would have been proportionately higher in each instance if such excise tax had been included in the cost of said gasoline, and that bids of ap-

pellant to the United States for future work will be proportionately higher if such tax is imposed;

(c) Affidavit of Justin C. Daspit (R. 42) formerly Assistant Supervisor of Public Accounts of the State of Louisiana and presently counsel for said Department wherein affiant deposes that it was part of his duties to enforce the gasoline tax statutes of the State of Louisiana; that it has been and is the policy of said Department to regard contractors with the United States Government for levee construction work as independent contractors, and not as agencies or instrumentalities of the United States Government, this policy being predicated upon an opinion of the Attorney General of said State dated Aug. 27, 1930, and duly published in the "Opinions of the Attorney General of Louisiana"; that pursuant to such policy application of Trinityfarm Construction Company (appellant here) for refund of gasoline taxes paid by it from Dec. 1, 1930, to June 30, 1932, was denied and that the payment of gasoline tax by appellant and its application for refund thereof disclose that appellant had both actual and constructive knowledge of such tax and notice that the amount thereof should be incorporated in the price of its aforesaid bids for levee construction work as part of the basic cost thereof.

(d) Affidavit of William A. Cooper (R. 44), Assistant Supervisor of Public Accounts of the State of Louisiana, wherein affiant deposes that he has active charge of enforcing the questioned statutes; that the revenues of the State of Louisiana thereunder approximate a minimum monthly average of $700,000.00; that monthly reports to the State Treasurer are required in which refunds under Sec. 14 of such acts are not included; that the funds in the hands of the Supervisor of Public Accounts of Louisiana at the end of each month, and before settlement with the Treasurer, are sufficient in amount to meet any legitimate claim for refund of such taxes, even up to the amount of total tax collections if necessary; that such Supervisor always has on hand in cash a monthly minimum average of $12,000,

and that where an unliquidated claim for refund is pending it is the policy of the Supervisor to withhold in settlement with the State Treasurer an amount sufficient to satisfy such claim if established.

A preliminary injunction was granted as prayed for by appellant on Dec. 7, 1932 (R. 46); the cause was submitted on the merits Jan. 19, 1933 (R. 51); reargument called for by the Court on its own motion (R. 47) was submitted Mar. 16, 1933, and final decree was entered June 15, 1933 (R. 51) recalling the interlocutory injunction previously granted, denying appellant's prayer for injunction and dismissing its bill of complaint for reasons assigned in Findings of Fact and Conclusions of Law (R. 47) filed June 12, 1933.

Petition for Appeal (R. 52) was seasonably filed, Order Allowing Appeal (R. 54) was entered July 14, 1933, Assignments of Error were filed on the same date and the cause is now presented for review.

ASSIGNMENT OF ERRORS.

The District Court erred:

1. In denying plaintiff's prayer for a permanent injunction.

2. In recalling the interlocutory injunction issued herein.

3. In dismissing plaintiff's bill of complaint.

4. In failing to hold that the contracts between plaintiff and the United States for the construction of levees on the main stem of the Mississippi River are "Federal Instrumentalities."

5. In failing to hold that gasoline used by plaintiff exclusively in the performance of such Federal contracts is a part of plaintiff's equipment, and, as such, exempt from excise taxes sought to be levied by the State of Louisiana.

6. In failing to hold the excise tax complained of unconstitutional and void, as imposing a direct burden upon the performance by the Federal Government of its delegated powers.

7. In holding that the State of Louisiana may impose a direct burden upon the contracts between the United States and plaintiff by exacting from plaintiff payment of an excise tax for the privilege of using its equipment in the performance of such contracts.

8. In failing to hold that the statutes complained of, as administered by the State of Louisiana, are unconstitutional and void insofar as the same purport to levy an excise tax upon plaintiff for the privilege of using its gasoline wholly and exclusively in the performance of its contracts with the United States.

9. In failing to hold that the statutes complained of could have no application to gasoline used wholly and exclusively by plaintiff in the performance of its contracts with the United States, and that, if such application were intended, it was beyond the power of the State of Louisiana to levy such excise tax.

10. In holding that the State of Louisiana has power to levy and collect an excise tax from plaintiff for the privilege of using its gasoline solely in the performance of its contracts with the United States.

11. In holding plaintiff liable for payment of an excise tax for the privilege of using its gasoline solely in performance of its contracts with the United States.

12. In holding plaintiff liable for payment of the excise tax complained of when such tax is laid solely upon the use by plaintiff of its gasoline in performing its contracts with the United States.

13. In holding plaintiff to be a "dealer" in gasoline, and as such liable for the payment of an excise tax on gasoline, used exclusively and wholly by plaintiff in the performance of its contracts with the United States.

SUMMARY OF ARGUMENT.

Point No. 1.

The contracts existing between the United States and appellant for the construction of levees on the main stem of the Mississippi are means adopted by the Federal Government for carrying out its delegated powers.

Point No. 2.

The statutes complained of impose a direct burden upon the contracts existing between the United States and appellant.

Point No. 3.

The State is without power to impose the tax.

Point No. 4.

Appellant is without adequate remedy at law.

ARGUMENT.

Point No. 1.

The contracts existing between the United States and appellant for the construction of levees on the main stem of the Mississippi River are means adopted by the Federal Government for carrying out its delegated powers.

Congress was granted full jurisdiction over the Mississippi River by the commerce clause of the Constitution (Art. 1, Sec. 8, cl. 3) and has exercised its power by appropriate legislation. U. S. C. A. Tit. 33, Ch. 12, secs. 621 to 631, inclusive; Ch. 15, secs. 702 to 702m, inclusive; Act May 15, 1928, c. 569; 45 Stat. 334.

The effect of this constitutional provision and of the statutes enacted pursuant thereto is to vest in the Federal Government exclusive power to control and improve the Mississippi, and plans which it may devise and means which it may adopt to that end are wholly within its discretion and free from interference in any form by the several states.

In the exercise of this exclusive power Congress has made it the duty of the Secretary of War to apply available funds for improvement of rivers and harbors "by contract or otherwise" as may be most economical and advantageous to the Government. (Tit. 33, Ch. 12, sec. 622) In discharge of this duty the Secretary of War has caused to be executed and delivered to appellant the two construction contracts here involved.

Contracts so authorized and executed on behalf of the Government have repeatedly been held to be Governmental means or instrumentalities. See Gillespie vs. Oklahoma, 257 U. S. 501, holding that the owner of a Government oil lease contract on restricted Indian lands was a Governmental instrumentality; Indian Territory Illuminating Oil Co. vs. Oklahoma, 240 U. S. 522, holding similar mineral lease contracts in the hands of an assignee immune from state taxation; Choctaw O. & G. Co. vs. Harrison, 235 U. S. 292, holding the operator of coal mining lease contracts on

Indian lands a Federal instrumentality and its gross receipts exempt from an occupation tax; and, reciprocally, Burnet vs. Coronado Oil & Gas Co., 285 U. S. 393, wherein this Court said, with reference to a mineral lease executed by the State of Oklahoma for the benefit of its school children: "Here the lease to respondent was an instrumentality of the State for the purpose of carrying out her duty in respect of public schools. To tax the income of the lessee arising therefrom would amount to an imposition on the lease itself."

Contracts here under consideration between the United States and appellant differ in no important respect from those construed in the cases above cited and are agencies through which the Government "immediately and directly exercises its sovereign powers." Metcalf vs. Mitchell, 70 L. Ed. 384. As such they are immune from the taxing power of the State.

Point No. 2.

The statutes complained of impose a direct burden upon the contracts existing between the United States and appellant.

The questioned statutes, by their terms and as interpreted by the Supreme Court of Louisiana, purport to impose an excise or privilege tax, not a tax upon the gasoline itself. In State vs. Johnson, 138 So. Rep. 503, the Supreme Court of Louisiana had before it Act 6 of the Extra Session of 1928. In construing the statute, there relied upon by the State to impose a tax upon gasoline purchased within the State but used in interstate commerce outside the State, the Court said:

> "This is an excise, not a property, tax. The tax is laid, not upon the gasoline, but upon the right or privilege of selling, using or consuming it; the amount to be paid being based on the quantity involved. Lionel's Cigar Store vs. McFarland, 162 La. 956; 111 So. 341; Fleischmann Co. vs. Conway, 168 La. 547; 122 So. 845.

"The title to the Act 6 of Extra Session of 1928, page 14, reads in part:

> "'To provide revenues for the public highways of the State of Louisiana by levying a tax of four cents per gallon on all gasoline or motor fuel sold, used or consumed in the State of Louisiana for domestic consumption.'

"Section 1 of the act, so far as it refers to the levying of the tax, reads as follows:

> "'That there is hereby levied a tax of four cents (4c) per gallon on all gasoline, or motor fuel, sold, used or consumed in the State of Louisiana for domestic consumption.'

"Conceding that defendant is a 'dealer' in gasoline as defined by the act, in that it distributes the gasoline in this State, it does not follow that it must pay the tax on all the gasoline 'distributed', by virtue of the provision in section 2 of the act to the effect that the tax shall be paid by all who import gasoline into this State for 'distribution'. The word 'distribution' appears first in section 2 of the act, which defines the term 'dealer'. It does not appear in either the title, which indicates its purpose, or in Section 1, which levies the tax. It is therefore clear that the State has not levied the tax on any gasoline except such as is 'sold, used or consumed in the State of Louisiana'."

The construction placed upon the questioned statutes by the Supreme Court of Louisiana is binding upon this Court. Louisiana vs. Pillsbury, 105 U. S. 278; Brown vs. New Jersey, 44 L. Ed. 119; West vs. Louisiana, 194 U. S. 258; Missouri vs. North, 271 U. S. 40; Dorchy vs. Kansas, 272 U. S. 306. This construction expressly excludes from the burden of the tax the "distribution" of gasoline and, by unmistakable inference, similar acts of "storage" and "withdrawal" made the basis of decisions of this Court in Nashville etc. R. R. vs. Wallace, 77 L. Ed. 444, and Edelman vs. Boeing Air Transport, Inc., 77 L. Ed. 754.

There being no sale involved in the instant case, the tax can arise, if at all, solely with reference to gasoline "used or consumed". What is the meaning of this phrase in view of the holding of the Supreme Court of Louisiana in the Johnson case, *supra?* The "use" actually involved in that case was "consumption"—the explosion of gasoline for fuel. The State Court held "use" alone—not distribution —was the taxable act. Could the State Court hold "distribution" of gasoline beyond the operation of the statutes and at the same time hold essential acts involved in "distribution", such as "storage" or "withdrawal" therefrom, subject to its terms? With utmost deference, in view of the recent disposition of American Airways vs. Grosjean, 78 L. Ed. 116, we submit that the Supreme Court of Louisiana has construed the words "used" and "consumed" in these statutes to be synonymous and interchangeable and has limited the application of the tax, in the absence of a sale, to a single class of transactions, namely, the application of gasoline to some one or more of its practical and well understood purposes. The fact that gasoline is a volatile fluid, incapable of practical use without consumption by explosion or evaporation lends force to this contention. Eliminating, as we must, "distribution" and the uses incident thereto which have been the basis of the interstate commerce decisions typified by the Nashville case, it is difficult, if not impossible, to conceive of a practical use of gasoline which does not, at the same time, result in its consumption.

But while we earnestly believe and here contend that such is the meaning and effect of these statutes as construed by the Supreme Court of Louisiana, that construction is not essential to appellant's right to relief. It would simply free the case from all difficulty. Helson vs. Kentucky, 279 U. S. 245.

If, however, we are in error and "use" is held to mean "withdrawal" from storage, the tax upon the privilege of withdrawal, under the facts in this case, is a direct burden

on the Federal contract between the United States and appellant and, as such, must fail.

In the interstate cases above cited the act of withdrawal is held to have been completed before interstate commerce began and the burden of the tax with respect thereto is held too remote. That the tax in each case was a burden on commerce is not questioned. The decisions impress us as entirely sound as applied to interstate commerce, especially in the Nashville case where acts of storage and withdrawal were, by the language of the statute in question, made the subject of the tax.

But, as said by Mr. Justice Holmes in Gillespie vs. Oklahoma, *supra*, distinguishing between attempts by a state to levy taxes on transactions in interstate commerce and upon the operation of the Federal Government. "The rule as to instrumentalities of the United States, on the other hand, is absolute in form and at least stricter in substance."

An examination of the facts here involved will demonstrate that the burden of this tax upon the Federal contracts is direct, even if "use" be given the most comprehensive meaning yet accorded to it.

Appellant, by its contract, bound itself to construct for the Government a levee and to supply all labor, supplies and equipment necessary therefor. It was a single, indivisible undertaking, covered by a single performance bond, and it comprehended every act necessary to be done from the first breaking of ground to the delivery of the completed levee. Among essential acts required to be done throughout the work was the securing of machinery and of fuel for its operation.

The Government, as was its exclusive right, approved the type of machinery used by appellant. For that machinery gasoline is an essential fuel. It was required in large amount and appellant purchased it in carload lots outside the State of Louisiana. It is agreed that the gasoline was purchased and imported for use exclusively in performance of the Federal contracts.

Appellant provided, as part of its equipment in performing its contracts, its own storage tanks in which its gasoline was stored at or near the contract sites and from which it was withdrawn as needed and consumed exclusively in the contract work.

Up to the time the gasoline came to rest in appellant's storage tanks it was in interstate commerce and no contention is made that it was subject to the questioned tax. It was then stored in appellant's tanks, on or near appellant's work and was a part of appellant's equipment, assembled for performance of its Federal contract. In no respect did it differ from the tanks which contained it or from the tractors and trucks in which it was presently to be consumed. Like them it had been brought to the site solely and exclusively because the Federal contract had been made and *was then actually being performed*. Every act with respect to the gasoline which could possibly be subject to the tax of necessity occurred after and not before the performance of the Federal contract had begun—a situation wholly different from that passed upon in the interstate commerce cases where the taxable acts were completed *before* interstate transportation commenced.

After the gasoline came to rest in appellant's storage tanks it was "used" in four ways, in the broadest possible sense of the word. It remained stored where it was; it was withdrawn from storage; it was put in appellant's fuel tanks and it was there exploded and consumed as engine fuel in actual levee construction.

Any single act enumerated might conceivably be selected as a taxable use, but not more than one. Since the statutes in terms purport to tax with respect to consumption, the temptation is strong to insist upon the final act, but in this we may be in error. Withdrawing the gasoline from storage tanks and putting it in the fuel tanks approach perilously near to "distribution", a use expressly held beyond reach of the tax. The statutes are silent as to storing but

it may be that the keeping and conserving of fuel is, in law, its use.

In legal effect it matters not at all which act the State may select as the basis of its levy. Each act occurs after and not before the Federal contract is commenced; each act is part performance of that contract; each act is done solely because of the Federal contract; each act adds part of the cost or expense of performing the Federal contract; each act is essential to the performance of that contract.

Taking storage, then, as the taxable act—the selection most adverse to appellant since it is most remote from actual levee construction—let us examine the effect of a State excise upon that privilege. If permissible it may not be limited in amount. Nor may the objects of the excise with logic be restricted.

If the state may tax the storage of gasoline used in performing a Federal contract, it may not be denied the power to tax the storage of coal, oil or other fuel or, for that matter, the "storage" of draglines or other equipment while not actively engaged in work upon the contract. The same principle applies in each instance and beyond its mere statement nothing is required to demonstrate its fallacy.

Surrender to the State the right to tax any one of the acts enumerated and it will have power to destroy the contract; to defeat the ability of the Government to enter into such contracts.

Argument is unnecessary as to the effect of an excise upon any one of the acts enumerated. It is in evidence and undisputed that the asserted tax would add to the cost of the work; that the bid price of appellant to the Government would have been higher upon these identical contracts had appellant conceded the validity of the asserted tax; that future bids will be proportionately higher if the tax is sustained. A burden more direct upon the contract, and through it upon the Government, cannot easily be conceived —a burden falling with equal force and certainty regardless of the act subjected to the tax.

Point No. 3.

The State is without power to impose the tax.

The invalidity of taxes of this nature is established by an unbroken line of decisions of this Court. The leading case is McCulloch vs. Maryland, 4 Wheat. 316. The facts in the Maryland case are familiar to all informed lawyers, and the profound effect of that decision upon the development of the Union for more than one hundred years is uniformly recognized. There, as here, a State had attempted, through imposition of a tax, to burden the operation of a means selected by Congress for the performance of a Federal function. The Court, in an opinion by Chief Justice Marshall, announced doctrines from which there has been no substantial departure, and upon which the power of the Federal Government largely depends to this day. The Court struck down the State tax upon the ground that the Federal power is expressly and of necessity supreme within its jurisdiction: that the power to create implies the power to protect, and that there is no protection where another sovereignty can exercise power to tax the means selected by the Federal Government.

There the means consisted of a bank operating under a Federal charter, a contract of an especial nature with the Federal Government. Here the means consists of a contracting corporation selected by the Government, and operating under a contract with the Executive Department of the Government. The analogy is complete, and the limitation upon the State of Maryland applies with equal force to the State of Louisiana.

In disposing of the contentions of the State of Maryland adversely to it, Chief Justice Marshall used the following language, marked alike for its clarity and force:

> "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution

powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them. * * *

"* * * We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.

"We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise. * * *

"The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This, we think, the unavoidable consequences of that supremacy which the constitution has declared."

A similar question arose in the case of Stockton vs. Baltimore Railway Company, 32 Fed. 9, and was there decided in an opinion written by Mr. Justice Bradley which subsequently had the full approval of the Supreme Court, first, in Pembina, etc. Co. vs. Pennsylvania, 125 U. S. 181, and later in Horn Silver Mining Company vs. New York, 143 U. S. 302.

In the last mentioned case, in speaking of the limitation

upon the power of a State to exclude or control the activities of a foreign corporation, it is said:

> "The other limitation on the power of the State is, where the corporation is in the employ of the general government, an obvious exception, first stated, we think by the late Mr. Justice Bradley in Stockton vs. Baltimore & N. Y. Ry. Co., 32 Fed. Rep. 9, 14. As that learned Justice said: 'If Congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union.' And this Court, in citing this passage, added, 'without the permission and against the prohibition of the State.'" Pembina & Co. v. Pa., 125 U. S. 181; 31 L. Ed. 650.

In the Pembina case, the Court, after announcing the doctrine as above quoted, used the following language:

> "And undoubtedly a corporation of one State, employed in the business of the General Government, may do such business in the other States without obtaining a license from them."

In Sault Ste. Marie vs. International Transit Company, 234 U. S. 333, an attempt was made by a city to require the payment of a license fee for the maintenance of a ferry between a boundary State and Canada. The Supreme Court denied the power to impose the license fee upon the ground that the ferry was a means used in the promotion of foreign commerce, and that, as such, its operation was beyond the power of any State or municipality to regulate or control by the imposition of a license fee. There, as here, the power of Congress arose through the force of the Commerce Clause of the Constitution. The fact that the operation of the ferry was a direct transaction in foreign commerce, and therefore exempt from the imposition of a license fee, while here the transaction is an incidental aid to commerce in protecting a national waterway, detracts nothing from the force of the principle, which exempts every

governmental means from liability to the State for any character of license, privilege, or excise tax.

In Panhandle Oil Company vs. Mississippi, 277 U. S. 218, the doctrine was given an application much more far-reaching than is required in the instant case. There the State sought to collect from the oil company sales taxes upon sales made by the oil company to the Coast Guard and the Veteran's Hospital, both being Federal undertakings. Upon the ground that the collection of such a tax imposed a burden upon the operation of governmental undertakings, the power of the State to impose the tax was denied. Manifestly, the operation of the tax complained of was remote, as compared to the effect of the excise here sought to be collected by the State, for the use by the contractor of equipment necessary to the performance of his contract with the Government. It was not apparent that the operation of the tax had increased the cost to the Government of the gasoline in question, or that the Government would receive any benefit from the remission of the tax. Here it is undeniable that the collection of the excise will add to the contract price which the Government must hereafter pay for the performance of the work which it requires to be done, and it is conceivable that excise taxes of this character, if permitted upon the use of equipment of contractors in governmental work, would come to constitute a very considerable portion of unit prices which the Government would be required to pay.

In Helson vs. The State of Kentucky, 279 U. S. 245, the Court was called upon to examine a question identical in principle with the one under consideration. The State, in that case, undertook to levy an excise upon the use of gasoline for power in the operation of an interstate ferry. In holding this attempt to be beyond the power of the State, the Court said:

> "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for us-

ing a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a State upon the interstate commerce transportation of the subjects of commerce, as this court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected."

The doctrine announced, sound beyond peradventure, and now the established law of the land, applies, in every detail, to the present case. Here, as there, the tax was sought to be laid upon the use of gasoline. Here, as was there expressly recognized by the Court, the claimed power to tax the use of gasoline would carry with it as a necessary corollary the power in the State to tax the use of every piece of equipment employed by the contractor in performance of its contract with the Government.

No one will be heard to question the soundness of the rule laid down in the Helson case in the following language: "A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce." Could a different rule possibly apply if the sentence read: "A tax which falls directly upon the use of one of the means by which a government contract is carried on directly burdens that contract?"

There can be but a single answer to the question. Precedent and reason combine to demonstrate that such a tax does, in fact, directly burden the contract.

If the power of the State of Louisiana to collect the excise claimed upon the use of gasoline, under the circumstances of this case, should be sustained, the power of the Federal Government to utilize private contractors as a medium for the performance of public work would be at an end.

It must be constantly borne in mind that the excise here sought to be collected is upon the use by the contractor of its equipment, and not upon its sale. As said by the Court in Hart Refineries vs. Harmon, 278 U. S. 499:

> "The difference between an excise tax based on sales and one based on use of property is obvious and substantial."

The immunity here sought to be established is against the assumed power of the State to lay a tax upon the use of equipment devoted exclusively to the performance of a public contract—an immunity essential to the continued use by the Federal Government of means which it has adopted from the beginning in carrying out its delegated powers.

The instances in which this Court has restrained the various States from imposing burdens upon operations tending to promote the objects of the Federal Government are as varied as are those objects themselves, but the controlling principle announced in each case is the one first stated in McCulloch vs. Maryland, which denied to the States for all time any power "by taxation, or otherwise, to retard, impede, burden or in any manner control, the operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general Government." Language more positive and comprehensive could not be found. The immunity is absolute in every case where the effect of the tax will be to retard, impede, burden, or in any other manner, control the operation of the Federal law. Any relaxation of the rule would be an intolerable invasion of essential Federal power.

We find neither decision nor logic supporting the claim here asserted by the State. On the contrary numerous precedents of ultimate authority deny its existence.

Certain propositions are proved by mere statement. The supreme and exclusive power of the Federal Government

over subjects delegated to it is no longer questioned. It is and, of necessity must be, given universal application.

Its meaning is plain when thoughtfully considered. It goes not merely to the object delegated but to the methods of its attainment. When the people delegated to the Fedral Government the power "to regulate commerce with foreign nations, and among the several states * * *" a cession of surpassing importance was fully completed. Thenceforth the voice of every State was stilled not as to the defined types of commerce alone but as well as to every method, means, instrumentality, or agency which the Congress, in its sole discretion, might adopt to regulate such types of commerce within the broad meaning which that term has come to have. As to such delegated powers and the methods of their exercise it is as though the several States had ceased to exist. They have been correctly described as powers belonging to the whole people and by them reposed in the General Government for exercise by it for the benefit of the people as a whole without regard to the interests of the several States as such, "without the permission and against the prohibition of the State."

The contracts upon which the Construction Company is engaged reach back for their source to the power granted in the quoted clause. Congress, in aid of commerce, has undertaken the flood control plan. Its discretion alone has determined what should be done and how it should be accomplished. All of the States combined have been and are powerless to control in any particular the exercise of that discretion.

Congress has the exclusive selection of the processes or ways or means by which this plan may be accomplished. It has seen fit to authorize the making of contracts upon competitive bids for various portions of the work. Its right to do so cannot be brought in question.

Having selected this process, method, way, means or instrumentality for attaining the object delegated to it, the Federal Government retains the exclusive power to direct

and to protect its operation. No State may say when such a contract shall be made, how it shall be performed or where or upon what terms. It is not a question of degree; it is the total lack of power in the State; a power which never had existence.

If, then, the State is wholly without power of any character with respect to the contract, how can it seriously assert the right to impose a direct burden upon it? The right to burden with a tax rests upon the existence of power—of jurisdiction—over the subject matter. Failing that power no right exists. If it be conceded, as it must be, that the State has no jurisdiction over such a contract, that it is not "a thing which exists by its own authority, or is introduced by its permission", then it must follow that the right to burden the contract directly by a tax is one which never existed.

We submit that no State has power to exact an excise from a contractor as the price of his right to use any portion of his equipment in carrying out of his contract with the Federal Government. The lack of power would not be more apparent if the contract were being performed in Alaska instead of within the borders of the State of Louisiana. The total absence of jurisdiction defeats the effort in the one case as in the other. Federal power knows no State lines; it is national in scope as it is exclusive in effect. Federal power is Federal jurisdiction and in fields which it occupies States may not intrude.

Confusion has arisen through use of terms less plain and comprehensive than those in which the principle was first announced but there has not been, and cannot be, any departure from the rule itself. It was deemed wise by Chief Justice Marshall and the great Court over which he presided to use simple terms of recognized meaning rather than to employ those of a technical or artificial significance. Throughout he speaks not of "agencies" or "instrumentalities" of the Government, but always of "means" which are employed by Congress or by the Government of the

Union and when, in the final paragraph quoted, he comes to express finally the total absence of the asserted power in the State, it is as to "the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

The language of the Court is plain and its meaning is unmistakable. Men may become confused as to what constitutes an "agency"; legal concepts are involved and technical considerations enter. "Instrumentality" is defined by a leading authority as "anything used as a means or an agency; means; medium; agency." The word could have been adopted by the Court but not to advantage.

No man of average learning fails to understand what is intended by the word "means". It is a word in common use, a general and comprehensive term, apt indeed for the expression of a principle vital to the existence of a nation. It is all-inclusive. No method or process which Congress may select falls outside its fair intent.

The confusion has arisen not, we believe, over the right of a State to burden directly a means employed by the Federal Government but rather over the question as to whether the burden was direct or so remote as to fall outside the rule. When it is asserted a contract with the Federal Government is not a means selected by Congress for carrying out its delegated powers careless thinking or want of knowledge is apparent. That the holder of such a contract is not an agent in the strict legal sense may be admitted; that the contract is a means to the delegated end may not be intelligently denied.

What is meant, most frequently, is that the incidence of the tax on the governmental means is not admitted or, if it exists, that it is too remote.

A forceful statement of the rule, applicable especially to Government contractors such as appellant, is found in Osborn vs. Bank, 9 Wheat. 737 at 865, where Chief Justice Marshall said:

"But it is contended, that, were their resemblance to contractors more perfect than it is, the right of the State to control its operations, if those operations be necessary to its character as a machine employed by the government, cannot be maintained. *Can a contractor* for supplying a military post with provisions, be restrained from making purchases within any State, or from *transporting* the provisions to the place at which the troops were stationed? or could he be fined or *taxed* for doing so? We have not yet heard these questions answered in the affirmative. It is true, that the *property* of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank. But we do not admit, that the *act* of *purchasing*, or of *conveying* the articles purchased, can be under State control." (Italics ours.)

Here the State seeks such control: to tax appellant for the privilege of storing or of transporting its own gasoline from one piece of its own equipment to another in performing its Federal contract. Interference could not be more burdensome or more direct. If sustained at all, the power is without limit and the immunity of Federal instrumentalities is no more. Fortunately, the asserted power does not exist.

Point No. 4.

Appellant is without adequate remedy at law.

Brief comment only is required to show that appellant has no adequate remedy at law. The objection was not seriously urged below and is without merit.

Under the general law of Louisiana taxes paid under an invalid law cannot be recovered even if paid under protest. Section 14 of the questioned statutes provides in part: "The tax herein levied shall not apply to *sales* to the United States Government or any agency or department thereof, and when such tax is paid by the said United States Government or any agency or department thereof it shall be refunded by the Supervisor of Public Accounts * * *" under conditions stated.

It will be observed that the purported immunity extends solely to a transaction not engaged in by appellant—a sale. Any "use" or "consumption" of gasoline by the Government or in furtherance of a Government contract is left subject to the tax and the unwary taxpayer who parts with his money has lost it for all time.

If more be required it may be noted that no judicial machinery is set up for securing refunds even upon sales. The question of whether or not a right to the refund exists is left wholly to the Supervisor of Accounts from whose adverse ruling there is no redress. Equity alone can afford appellant the relief to which it is entitled on the facts.

The controversy here presented is as old as our dual form of Government. It will recur as long as States attempt to exercise powers which "come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme."

It is respectfully submitted that the judgment be reversed.

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DEC 27 1933

BATON ROUGE, LOUISIANA

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 355

TRINITYFARM CONSTRUCTION COMPANY,
Appellant,

versus

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS OF LOUISIANA,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

BRIEF OF DEFENDANT-APPELLEE.

GASTON L. PORTERIE,
Attorney General of Louisiana;

PEYTON R. SANDOZ,
Special Assistant Attorney General of Louisiana;

JUSTIN C. DASPIT,
Special Assistant Attorney General of Louisiana;

Counsel for Defendant-Appellee.

Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O. La.

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Appellant,

versus

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS OF LOUISIANA,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

BRIEF OF DEFENDANT-APPELLEE.

SUMMARY OF ARGUMENT.

The appellant has reduced to four salient propositions the various grounds of objection leveled at the judgment of the District Court herein, as outlined in the thirteen specific paragraphs set forth in its assignment of errors. The four propositions now apparently relied upon are set forth at page ten of appellant's brief, as follows:

Point 1. "The contracts existing between the United States and appellant for the construc-

tion of levees on the main stem of the Mississippi, are means adopted by the Federal Government for carrying out its delegated powers."

Point 2. "The statutes complained of impose a direct burden upon the contracts existing between the United States and appellant."

Point 3. "The State is without power to impose the tax."

Point 4. "Appellant is without adequate remedy at law."

As we conceive it, appellant corporation's points two and three are but corollaries of point one, and might have been epitomized in the one general contention that appellant corporation is an agent or instrumentality of the Government and for this reason is immune from State taxation. We shall accordingly argue these three points as one, and from the angle noted.

We will treat of separately in this brief appellant's point four, wherein it contends that it is without adequate remedy at law.

ARGUMENT.

Appellant's Points 1, 2 and 3.

We are free to concede that if appellant, by any rational process of reasoning, can establish legal justification for its claim that it is an agency or instrumentality of the Federal Government its fight is won, and it need not have burdened this Court with consideration of any other issue.

The concession which we make is not predicated, however, upon any particular argument of the appellant, nor upon any of the authorities cited by it, but upon the plain language of Section 14 of Act 6 of the Extra Session of the Legislature of Louisiana of 1928, as amended, and upon Section 14 of the Amendment to the Constitution of Louisiana, as proposed by Act 1, (E. S.) of 1930.

Section 14 of each provides, as follows:

> "Section 14. The tax herein levied shall not apply to sales to the United States Government or any agency or department thereof, and when such tax is paid by the said United States Government or any agency or department thereof it shall be refunded by the Supervisor of Public Accounts upon proper showing and authentic proof thereof, and shall be paid from the funds in the hands of the said Supervisor of Public Accounts which have been collected * * * and which have not been paid by the said Supervisor of Public Accounts to the State Treasurer as provided herein." *Id.*

There is no need then, for appellant to bolster up its claim by citation of *Gillespie v. Oklahoma, 257 U. S. 501; Panhandle Oil Company v. Mississippi, 277 U. S. 218,* nor any other case dealing with the rights, immunities and exemptions of actual agencies or instrumentalities of the Federal Government. The statute and Constitutional Amendment of Louisiana herein involved accord to plaintiff corporation full exemption and immunity from the taxation in question,—if it is qualified to avail itself of those provisions.

The sole basis for appellant's claim that it is an agency or instrumentality of the Federal Government is

that it holds contracts to construct certain levees for the United States along the main stem of the Mississippi River, in Louisiana.

From this premise it argues to the conclusion that Louisiana's excise taxes on the privilege of using, consuming and selling gasoline in the State constitute the laying of a direct burden upon the performance by the Federal Government of one of its delegated powers.

This burden, so appellant solemnly asserts, arises from the fact that the cumulative five cents per gallon excise tax added to the cost of gasoline used and utilized by it in the performance of its contracts with the Government makes the Government pay more for its levees because the added cost of the tax will enter into the computation of every intelligent bidder and become a part of the cost of the work to the Government.

We accentuate the fact that appellant's contention is that *in future contracts* for levee construction, if the gasoline tax is taken into consideration by the bidder, the cost of the work to the Government will be increased by just that much, thereby imposing a direct burden upon the performance by the Federal Government of one of its delegated powers.

The Court will note that appellant corporation not only does not assert that its *present contracts* with the Government are so burdened, but that it actually introduced proof in the trial Court to the effect that in computing its bids for the work in question it *did not* include in the cost thereof the gasoline tax which is the subject matter of this controversy.

At pages *40, 41 and 42 of the Record* will be found the affidavit of J. D. Kirven, Vice-President, Director and General Manager of appellant corporation, wherein he recites specifically that while the *purchase price* of the gasoline was calculated in compiling the cost for bids for the work in question, there was not included in the computation *"any sum whatever to cover the excise taxes claimed by the State of Louisiana for the privilege of using such gasoline in the performance of such work." (R. 41, 42).*

To raise the question of the possible *future* effect of the imposition of such taxes upon similar contracts which may *hereafter* be entered into by appellant, or others, with the Government, is to raise a question which is moot, and Courts do not ever assume to determine purely speculative propositions.

Appellant's solemn averment and proof of its failure to include the amount of the excise taxes referred to in its *present bids and contracts* with the Federal Government effectively close the door to any complaint it may at this time make on the score that its contracts with the Government are burdened by the aforesaid taxes because *they are admittedly not so burdened.* Surely this Court cannot, in reason, be asked to supply in advance relief from a contingency which has not only *not occurred*, but which may *never* happen.

If appellant's present contracts are not weighted by the taxes in controversy,—since they were not figured into the cost of the work to the Government,—wherein lies the burden upon appellant's contracts with the Government, and wherein lies the interference by the State of Louisiana

with the Federal Government in carrying out its delegated powers?

Appellant corporation, before it entered into its contracts with the Government, surely knew, or was presumed to know, that the State of Louisiana, by statute, provided for the imposition of the so-called gasoline taxes. No one may plead ignorance of the law, and yet in the face of this knowledge, in entering into its contracts with the Government it admittedly failed to compute the aforesaid excise taxes in its aforesaid bids, as an item of expense comprising a part of the basic cost of the work.

Appellant having failed to exercise a right which prudent and intelligent bidders are presumed to exercise, and having displayed a lack of vigilance by failure to protect its own interests, it suddenly awakens from its slumber and now seeks to retrieve its error at the expense of the State of Louisiana, which, if permitted to do, would be tantamount to penalizing said State for appellant's laches, and would enable it to profit from its own neglect and lack of foresight at the expense of the State of Louisiana without any material advantage to the Federal Government, in whose behalf appellant now so vociferously clamors on the pretext of removing a burden from the Government's exercise of delegated powers.

We submit that if there is anything which equity abhors, and appellant corporation is invoking the gracious ear of equity, it is the somnolent individual who through his own fault brings harm upon himself, since it is a cardinal restrictive maxim of equity "that equity aids the vigilant, not those who slumber on their rights."

The appellee makes this specific defense in her answer herein as set forth in *paragraph 25* thereof, and which may be found *at pages 21 and 22 of the Record.*

Necessarily, one engaged in performing work for the Government under contract, or otherwise, is to some extent an instrumentality of the Government, but it does not follow that because one uses his private property for the purpose of deriving individual profit from his dealings with the Federal Government he may screen his property from State taxation by invoking the rule that neither the Federal Government nor the State Government can tax instrumentalities the one of the other.

Of course, we understand that the immunity which appellant seeks is against the powers delegated to the State of Louisiana by its Constitution and the statute herein involved to lay a tax upon the use of gasoline—which it is pleased to call a part of its equipment—devoted exclusively to the performance of its contracts with the Federal Government, an immunity which, appellant contends, is "essential to the continued use by the Federal Government of means which it has adopted from the beginning to carry out its delegated powers".

It is to our minds a far-fetched and visionary presumption to assert that one who effects an individual and transitory alliance with the Government becomes, even as to that transaction, a governmental agency or instrumentality in the sense that it may claim all tax immunity and exemptions which accrue to the Government in its sovereign capacity.

It is difficult to conceive of a private corporation, *operating exclusively for private gain*, and with absolutely no relation to the Government except that which arises from a purely ephemeral business contract, for the execution of its part of which it will obtain full and ample remuneration, to be allowed by any Court to masquerade as a governmental agency or instrumentality *for no other purpose in the world than to escape payment of its proportionate share of legitimate taxation.*

Surely, if the Government considered appellant corporation to be one of its agencies or instrumentalities, *or intended to make it such by virtue of its contracts with appellant*, it would not have bound appellant to the obligation of obtaining, at its own expense, all required licenses and permits when, as a governmental agency or instrumentality, it could not be legally required by any State or municipality to procure such licenses or permits.

We point out that under the terms of the contracts in question appellant corporation is obligated, without additional expense to the Government, to obtain all required licenses or permits which may be required of it, and therein, as a matter of fact, lies the secret of the failure of appellant corporation to add to the cost of its work the amount of gasoline taxes which it knew it would be required under the laws of Louisiana to pay. *(See Admissions, paragraph 26, R. p. 27; see further, contract, Article 10, R. pp. 34-35).*

We believe it is amply demonstrated that appellant's business relation with the United States Government is not that of a servant, agent, or instrumentality, but purely

and simply that of an independent contractor, in which latter capacity appellant may not merit, nor claim, immunity from any form of taxation under guise of being a governmental agency or instrumentality.

But even if appellant corporation were entitled to the classification of an agent or instrumentality of the Government, it still does not follow that appellant may claim exemption from taxation on that ground merely because it holds contracts with the Government to do certain work which the Government, in its sovereign capacity, elects to have done.

A private corporation cannot claim exemption from taxation merely because it is transitorily or temporarily engaged in the service of the United States, regardless of the character of such service. *Louisville Bank v. Kentucky, 9 Wall. 353, 19 L. Ed. 701; Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375.*

State taxation of the instruments or agencies of Government is not objectionable on this ground if it does not impair their usefulness or efficiency, or hinder them from serving the Government as they were intended to serve it. *Central Pac. R. R. Co. v. People, 162 U. S. 91; Thompson v. Union Pac. R. R. Co., 9 Wall. 579.*

Appellant corporation does not pretend that its usefulness or efficiency has in any manner been impaired, or will in any manner be impaired, by the imposition of the taxes in controversy; nor does it contend that the payment of these taxes hinders it even to the slightest degree from serving the Government as it was intended to serve it.

Also, the tax not having been actually computed in the price of its bids there is no burden upon the Government or upon its contracts with appellant, nor is the Government one jot or tittle impeded in the exercise of its delegated powers by this tax, since the Government not only absolved itself by the terms of its contracts from the payment of all licenses or permits which may be required of the appellant, but the latter admits that it did not seek to impose this burden upon the Government, or to pass the burden on to the Government, if burden there was, by adding the amount of the tax to the cost price of the work contracted for.

How, then, can the imposition of a tax on the distribution, handling and use of gasoline which is not objectionable in amount, impair appellant's usefulness or efficiency, or hinder it from serving the Government as it should, when it has not computed the tax in the cost of its work, and especially when it is under no obligation to the Government to employ the type of machinery in its work requiring the use of gasoline to operate?

Appellant might have selected, as indeed it was free to do at its own will, the Diesel or other type of crude oil burning machinery, in which event it would have had to pay no taxes of the kind sought to be imposed by the State of Louisiana, since no excise tax is imposed by the State upon the privilege of handling, distributing, using or consuming crude oil in the State.

The Court will bear in mind that the Government, obviously for the purpose of satisfying itself of the physical capacity or ability of appellant to efficiently execute the

work it was bidding for, at the time of submission of bids required appellant to furnish a list of the machinery it proposed to use on such work in the event the same should be awarded to it, *(Admissions par. 19, R. 26)*, but the Government did not undertake to *dictate* to appellant what particular makes, brands, or types of machinery or equipment appellant should use. *(Admissions par. 16, R. 25)*.

Thus, it is plainly established that if the imposition of the excise taxes sought to be levied by the State at all hinders appellant in serving the Government under its contracts, it is because appellant, of its own volition, and not by reason of any obligation (or even necessity so far as the proof shows), chose to equip itself with a certain type of machinery requiring gasoline to operate.

We have said that because appellant holds contracts with the Federal Government to build levees in Louisiana it does not follow that appellant thereby becomes in legal contemplation an agency or instrumentality of the Government and hence entitled to the immunities which ordinarily accrue to such agencies and instrumentalities. This Honorable Court has so specifically held.

In *Metcalf & Eddy v. Mitchell, 269 U. S. 514*, this Court said:

> "Not every person who uses his property or derives a profit in his dealings with the Government may clothe himself with immunity to taxation on the theory that either he or his property is an instrumentality of the Government within the rule that neither the Federal nor the State Government can tax instrumentalities the one of the other." *Id.*

In the cited case the question of the taxability of Governmental agencies, both State and Federal, was discussed at length, and this Honorable Court pointed out therein that it was not possible to state in terms of general application just what instrumentalities of either a State or the Federal Government are exempt from taxation by the other.

This Honorable Court, in the case referred to, while declining to attempt to lay down a hard and fast rule on the subject, did specifically hold that one who is not an officer or employee of a State, (or of the United States), does not establish exemption from taxes merely by showing that his income was received as compensation for services rendered *under a contract* with the State (or nation).

Here this Honorable Court made a clear distinction between claims for exemption from taxation by persons who are officers or employees of the Government (State or Federal), and persons who claim the exemption merely because they hold contracts to perform certain governmental work.

In the one case the officer or employee was held to be a governmental agent or instrumentality, and as such immune from State or Federal taxation; in the other, as contractor, an exemption from taxation was held to be inapplicable since the contractor "is neither an officer nor an employee of government, and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity."

Metcalf & Eddy v. Mitchell, supra, p. 524.

In the cited case this Court said that while it would not be understood as laying down any rule that taxation might not affect agencies of this character in such a manner as directly to interfere with the functions of government and thus be held void, it made it clear that one claiming exemption from taxation necessarily had to occupy the position or attitude of an officer or employee of the Government in order for the immunity to attach.

In the cited case, *at page 526*, this Court said:

> "But we do decide that one who is not an officer or employee of the State does not establish exemption from Federal income taxes merely by showing that his income was received as compensation for services rendered under a contract with the State; and when we take the next step to a complete disposition of the question, and inquire into the effect of the particular tax, on the functioning of the state government, we do not find that it impairs in any substantial manner the ability of plaintiffs in error to discharge their obligation to the State or the ability of a State or its sub-divisions to procure the services of private individuals to aid them in their undertakings." *Central Pac. R. R. Co. v. California, 162 U. S. 91. Id.* See, also, *Willcutts v. Bunn, 282 U. S. 216.*

The principle of the ruling here laid down is thoroughly applicable to appellant who is in no sense an employee or officer of the Federal Government, and whose income or remuneration is derived exclusively as compensation for services rendered under *contracts* with the Government, and whose ability to discharge its obligations to the Government is not in the slightest manner impaired or hindered because of the requirement by the State of Louisi-

ana that appellant pay the same taxes on gasoline that *all other persons* who sell, use or consume the commodity in the State are required to pay.

In *Susquehannah Power Company v. Tax Commission, 283 U. S. 291*, this Court declared that "exemption of government instrumentalities from taxation by another government must be given practical construction not unduly impairing the taxing power of one government or the appropriate exercise of functions by the other".

In that case it was contended that because the Susquehannah Power Company was a licensee of the Federal Power Commission the concern was thereby converted into a government agency or instrumentality, and that the property owned and utilized by it in exercising the authority delegated to it was immune from taxation since this property was the means by which the company in part was largely dependent for the exercise of the rights and powers conferred upon or delegated to it as a licensee of the Federal Power Commission.

In passing on the point this Honorable Court said:

> "Assuming, for present purposes that the licensee of the Power Commission is a Federal instrumentality immune from taxation or other direct interference by the State, it does not follow that the property appellant uses in its power project is clothed with that immunity. The exemption of an instrumentality of one government from taxation by the other must be given such a practical construction as will not unduly impair the taxing powers of the one or the appropriate exercise of its functions by the other." *Id. p. 294. Cf. Metcalf & Eddy v. Mitchell, supra.*

"With that end in view, the distinction has long been taken between a privilege or franchise granted by the government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private business advantage. The distinction was pointed out by Chief Justice Marshall in McCulloch vs. Maryland, 4 Wheat. 316, and in Osborne vs. Bank, 9 Wheat. 738; see Union Pacific R. R. Co. vs. Peniston, 18 Wall. 5.

"It has been followed without departure and property so owned and used has uniformly been held to be subject to state taxation. Thompson vs. Union Pac. R. R. Co., 9 Wall. 579; Central Pac. R. R. Co. vs. California, 162 U. S. 91; Union Pac. R. R. Co. vs. Peniston, supra; Baltimore Shipbuilding & Dry Dock Company vs. Baltimore, 195 U. S. 375; Gromer vs. Standard Dredging Co., 224 U. S. 362; Ackerlind vs. U. S., 240 U. S. 531; Alward v. Johnson, 282 U. S. 509; Choctaw, O. G. R. R. Co. vs. Mackey, 256 U. S. 531; Group No. 1 Oil Corporation vs. Bass, 283 U. S. 279."

Without burdening the Court with a resumé of all of the decisions just hereinabove cited, we will select a few of the pertinent ones with the hope of showing their analogy to the case at bar.

In *Alward v. Johnson, supra*, it was held that property used in the operation of an automotive stage line was not exempt from State taxation because it was used in connection with the transportation of mails. Its applicability to the case at bar is obvious. This Court said:

"There was no tax upon the contract for such carriage (of mails); the burden laid upon the property employed affected operations of the government only remotely." *Id.*

In the case at bar there is not even inferentially a tax upon appellant corporation's contracts with the Government, because appellant admits that the taxes in controversy were not passed on to the Government by it at the time the contracts were entered into; but, in view of the enunciation of this Court in *Alward v. Johnson, supra*, just hereinabove quoted, the burden laid upon appellant corporation's property, that is to say its gasoline, if burden there be, could only affect the operations of the Federal Government remotely, if by any chance it may be construed that the "burden" complained of in the case at bar does reach the Government.

In *Gromer v. Standard Dredging Company, supra*, the proposition was involved of the right of the Insular government of Porto Rico to tax the use of machinery and boats in the harbor of San Juan in the performance of a dredging contract with the United States Government. The point was made by the dredging company that as an agency or instrumentality of the Federal Government the use of the dredging machinery and boats in dredging operations in the harbor of San Juan was absolutely essential to the carrying out of its contract with the Government, and that to tax the use of this machinery and these boats was to impose a tax upon an instrument of the National Government.

This Court held that such a contention could not prevail, citing *Baltimore Shipbuilding Company v. Baltimore, 195 U. S. 375.*

In *Thompson v. Union Pacific Railroad Company*, *supra*, this Court, in the body of its decision, said.

> "No one questions that the power to tax all property, business and persons within their respective limits, is original in the States and has never been surrendered. It can not be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection.
>
> "We perceive no limits to the principle of exemption which the complainants seek to establish. It would remove from the reach of State taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails or of government property of any description by land or water, or in supplying materials for the use of the government, or in *performing any service of whatever kind*, might claim the exemption." *Id.* (Italics ours.)

Our conception of a governmental agency or instrumentality such as is entitled to plead exemption or immunity from taxation, is primarily an agent or instrument created by Congress, and designed for the execution of some governmental or quasi-governmental function. Or, such an agent or instrument as is so closely connected with the Government as to be inseparable from it, and whose functions are confined to the carrying out of particularly delegated duties partaking of the sovereign nature of the Government. Its existence must be so closely allied with the Government, and its association so intimate as to easily

permit the identification of the agent or instrument either as an integral part of the Government itself, or as occupying a relationship closely akin thereto.

There must either be a modified grant of sovereignty, so to speak, by Congress to the instrument or agency, or the relationship to the Government must be so close as to make the agent or instrument a direct servant of the Government and entirely amenable to its will and dictation in all respects. It must be bound in some degree at least to the duties of a servant with little or no independence of action, and so completely under the domination of the Government as to be subservient to its will in all matters relating to the particular work or functions it it called upon to carry out or exercise.

We cannot conceive of an independent contractor assuming the role of an agency or instrumentality of the Government, certainly not to the extent that it may properly claim immunity and exemption from taxation on that score.

The evidence before this Honorable Court in the form of precise facts judicially admitted conclusively establishes that appellant corporation, in its aforesaid relations with the United States Government, is an independent contractor and in no legal sense an agency or instrumentality of the Government; and if it should appear that appellant is an independent contractor its claim that it is an agency or instrumentality of the Government is not simply negatived but absolutely refuted, and its alleged

immunity from taxation as such governmental agency or instrumentality becomes a mere myth.

In Paragraphs 1, 2, 3 and 4 of the Admissions, *(R. 23)*, and in Paragraphs 14, 16 and 17 of the Admissions, *(R. 25)*, the independent nature of appellant corporation's business is admitted.

In Paragraph 5, *(R. 23, 24)*, and Paragraph 12, *(R. 24, 25)*, and Paragraphs 19, 20, 21 and 26 of the Admissions, *(R. 26, 27)*, the existence of contracts for the performance of a specified work, levee construction, is admitted; in Admissions, Paragraphs 20, 21 and 22, *(R. 26)*, the agreement to perform the work for a fixed price is admitted; in Paragraphs 23, 24, 25 and 26, *(R. 26, 27)*, the exclusive employment of labor and assistants by the appellant corporation, and appellant corporation's complete control over such labor and assistants is admitted; and in the Admissions, Paragraph 23, *(R. 26)*, and Paragraph 7, *(R. 24)*, and Paragraphs 24, 25 and 26, *(R. 26, 27)*, the right to control the work contracted for while in progress, *except as to results*, is admittedly reserved to appellant corporation.

There is no question then of the fact that the relation existing between appellant corporation and the Federal Government is that of contractor and contractee, and not that of employer and employee, or master and servant.

This Honorable Court has often recognized the distinction between agents, servants or instrumentalities of the Government and that of independent contractors, and in

Casement v. Brown, 148 U. S. 615, in discussing the contention of defendants that they were not independent contractors but employees of certain railroads for which they were constructing a particular work, this Court said:

> "With reference to the first contention (that of not being independent contractors) obviously the defendants were independent contractors. The plans and specifications were prepared and settled by the railroad company; the size, form and place of piers were determined by them, and the defendants contracted to build piers of the prescribed form and size at the places fixed. They selected their own servants and employees. Their contract was to produce a specified result. They were to furnish all the materials and do all the work, and by the use of that material and the means of that work were to produce the complete structures. The will of the company was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the company, the contract provided for their daily supervision and approval of both material and work. The contract was not to do such work as the engineers should direct, but to furnish suitable material and construct certain specified and described piers, subject to the daily approval of the company's engineers. This constant right of supervision, and the continuing duty to satisfy the judgment of the engineers, do not alter the fact that it was a contract to do a particular work and in accordance with plans and specifications already prepared. They did not agree to enter generally into the services of the company, and do whatsoever their employers called upon them to do, but they contracted for a specific work. The functions of the engineers were

> to see that they complied with the contract—only this, and nothing more! They were to see that the thing produced and the result obtained was such as the contract provided for." *Id. 13 S. Ct., p. 675.*

How manifest is it from this Court's outline of the status of an independent contractor that appellant corporation occupies this identical relation toward the Government of the United States in the performance of its present contracts therewith?

The plans and specifications for the levee construction work are prepared and settled by the Government; the size, form and place of the levees are determined by it; appellant corporation contracted to build levees of the prescribed form and size and at the place fixed in its contracts with the Government. Appellant corporation selects its own servants and employees; its contract is to produce a specified result; it is to furnish all the material and do all the work and by the use of that material and the means of that work, are to produce completely constructed levees. The will of the Government is represented only in the *result* of the work and not in the *means* by which it is accomplished.

Appellant's contract is not to do such work as the engineers of the Government should direct, but to furnish suitable material and construct certain specified levees, subject to the daily approval of the Government engineers. This constant right of supervision and the continuing duty to satisfy the judgment of the engineers do not alter the fact that it is a contract to do a particular work and in accordance with plans and specifications already prepared.

Appellant corporation did not agree to enter generally into the services of the Government and to do whatsoever the Government called upon it to do, but it contracted for a specific work—the construction of levees. The function of the Government's engineers is to see that appellant corporation complies with its contracts—"only this, and nothing more!" These engineers are to see that the thing produced, and the result obtained, are such as the contracts with the Government provide for.

Clearly, then, appellant corporation functions only in the capacity of an independent contractor in carrying out its aforesaid contracts, and bears no such relation to the Government in executing them as would entitle it to the classification of an agent or instrument of the Government, at least in the sense that it may claim the exemption and immunity from taxation which such agencies and instrumentalities ordinarily enjoy.

Appellant seems to rely strongly upon the case of *Helson v. State of Kentucky, 279 U. S. 245*, as supporting its contention that the tax upon the sale, use or consumption of gasoline in Louisiana falls directly upon the use of one of the means by which a Government contract is carried on, and therefore directly burdens that contract.

We need only point out that appellant's contracts with the Government are admittedly not burdened by the tax in question since the tax was not taken into consideration by the appellant at the time of the submission of its bids for the work it is now doing for the Government, but as a matter of fact there is little or no applicability of the *Helson* case to the case at bar.

The immunity from taxation of the gasoline used as the motive power of the ferry boat referred to in the *Helson* case is predicated upon a state of facts which clearly warranted this Honorable Court's ruling therein, but which ruling is peculiarly applicable only to cases which constitute a direct parallel as to the facts involved, and cannot possibly be stretched to cover a situation such as is presented by the facts of the instant case.

In the *Helson* case this Honorable Court affirmed what it had many times previously held, that the operation of a ferry boat across a border stream between States is interstate commerce. The Court was dealing with a tax sought to be laid upon the use of a commodity which had been already launched in what was undoubtedly interstate commerce, and which had not become disassociated from that commerce by attaining a situs in Kentucky.

The gasoline used to propel the ferry boat was purchased, and delivered to the boat, in Illinois, thereby being thus launched in interstate commerce, and deriving this character from the fact, as already stated, that the operation of a ferry boat between border States constitutes interstate commerce. The gasoline was not unloaded in the State of Kentucky, never became commingled with the mass of property in the State of Kentucky, and never attained a situs in that State. It remained where it began—in interstate commerce—and was thereby thoroughly immune from taxation by the State of Kentucky.

Had the State of Illinois, however, sought to tax the storage or use of this gasoline under a statute similar to the Louisiana laws there could have been no question as

to the right of that State to tax the commodity upon its withdrawal from storage therein, and before its advent into interstate commerce.

In the case at bar appellant does not cite any authority emanating from any competent source which would be even remotely persuasive of the conclusion that the construction of levees in Louisiana by it for the Federal Government constitutes interstate commerce, and unless it can bring this particular transaction within the category of interstate business or interstate commerce there is small solace it may obtain, in our humble estimation, from the *Helson* case.

In the instant case the State of Louisiana is claiming payment of excise taxes for the privilege of distributing, consuming and using a commodity in the State which not only has become disassociated from interstate commerce by reason of having attained a situs in Louisiana, but which could not possibly become again associated with commerce, either interstate or intrastate, until after the taxes claimed had accrued and become collectible. *Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U. S. 147; Nashville Etc. R. R. v. Wallace, 288 U. S. 249; Gregg Dyeing Co. v. Query, 286 U. S. 472; Edleman v. Boeing Air Transport Inc., 289 U. S. 249.*

It is obvious that the appellant's main reliance is upon the *Gillespie* and *Panhandle* cases, *supra.* It is trying to maneuver itself into a position whereby it might invoke the protecting aegis of this Honorable Court's rulings in those cases, and while we do not concede their applicability to the case at bar, we believe it is a comparatively

easy matter to distinguish them from the case which is presently before this Honorable Court for determination.

In the *Panhandle* case the United States was the *direct purchaser* of the gasoline sought to be taxed. The commodity was intended for use by the Government in the operation of its Coast Guard Fleet in the Gulf of Mexico, and at its Veterans' Hospital, at Gulfport, Mississippi. This Honorable Court held that it is beyond the power of the States to lay a tax upon transactions by which the *United States secures* the things desired for its governmental purposes. And while this decision was rendered by a divided Court its thorough applicability to a Louisiana case identical in point of fact would be conceded by appellee since the Louisiana statutes particularly exempt from taxation sales of gasoline made to the United States Government.

However, appellant is not the United States Government, and while it tries to arrogate to itself the character of an agent or instrument of the Government it has failed so far as we can see to bring itself within that classification.

The *Gillespie* and cognate "Restricted Indian Land Cases" are *sui generis*, and have never been held by this Honorable Court to apply to any situation other than such as immediately parallels the facts presented therein.

As a matter of fact the *Gillespie* case is all but overruled by *Group Number 1 Oil Corporation v. Bass, 283 U. S. 279;* and in *Burnet v. Coronado Oil & Gas Company, 285*

U. S. 393, four members of this Honorable Court expressed the emphatic opinion that the *Gillespie* case should be overruled, advancing such cogent reasons therefor as to cause one to marvel that there should be further hesitation on the part of this Honorable Court to definitely depart from the doctrine enunciated in that case. As Mr. Justice Brandies, in his dissenting opinion in the *Burnet* case, *supra*, said, the *Gillespie* case "has served to render immune from State and Federal taxation vast private incomes", and that "to merely construe strictly its doctrine will not adequately protect the public revenues."

Appellant's Point No. 4.

Appellant contends that it is without adequate remedy at law *(Bill of Complaint, paragraph 20, R. p. 7)*, and this allegation is met by specific denial of appellee in paragraph 20 of her answer herein. *(R. p. 19)*.

The contention is predicated upon the alleged absence in the general law of Louisiana of proper provision for the recovery of taxes illegally collected or erroneously paid.

Regardless of whether this alleged deficiency exists in the general law of the State, special provision is made in the Louisiana gasoline taxing statutes for the refund by the Supervisor of Public Accounts of Louisiana of any such tax paid by the United States Government, or any of its agents or departments, upon proper showing and authentic proof thereof. (See Sec. 14, Act 6 of (E. S.) of 1928, as amended; Sec. 14, Act 1 (E. S.) 1930, quoted at page 3 of this brief, *supra*).

Appellant concedes that this remedy exists but insists that the purported immunity extends only to "a transaction not engaged in by appellant—a sale." That "any 'use' or 'consumption' of gasoline by the Government or in furtherance of a Government contract is left subject to the tax and the unwary taxpayer who parts with his money has lost it for all time." *(Appellant's brief, p. 28).*

We are sure counsel for appellant has inadvertently misstated the law. At *page 2* of Appellant's brief it correctly quotes in full Section 2, Act 6 (E. S.) of 1928, as amended, of which Section 2, Act 1 (E. S.) of 1930 is an exact counterpart, and this Section in unequivocal language denominates the importation of gasoline for *use* by the importer to be "the same as if it has been *sold* for domestic consumption." *(Last paragraph Sec. 2 Act 6 of 1928, Appellant's brief, p. 2).*

It is manifest from this quotation from the law that if one imports gasoline into Louisiana for his own use, this importation and use is deemed to be "the same as if it has been sold for domestic consumption", and if the Government, or any agency or department thereof, imports gasoline into the State for its or their own use, and has by any chance paid the tax thereon, a refund of the tax may be claimed of the Supervisor of Public Accounts of Louisiana the same as if the gasoline had been *sold* to the Government or an agency or department thereof, for domestic consumption.

As a matter of fact appellant has sought a refund of such taxes as it has actually paid, but the Supervisor of Public Accounts of Louisiana rejected the claim, not be-

cause "the purported immunity extends solely to a transaction not engaged in by appellant—a sale", but because the Supervisor could not conceive appellant to be the "United States Government, or an agency or department thereof", and appellant has never yet made to that office, or up to now to any Court, "proper showing" that it is entitled to claim that distinction.

The affidavits, unrefuted and irrefutable, of Justin C. Daspit, *(R. pp. 42, 43, 44)*, and of William A. Cooper, *(R. pp. 44, 45, 46)*, are conclusive that it is the policy of the Supervisor of Public Accounts to make proper refund of such taxes in cases where the refund is justified, and that she at all times has on hand ample funds for the purpose.

CONCLUSION.

We respectfully submit that appellant should have lodged its action in the law and not the equity side of the Court, but, without waiving this point, we likewise submit that appellant is entitled to no form of equitable relief.

We hold that appellant has utterly failed to establish that any burden has been placed upon its contracts with the United States to construct levees in Louisiana, particularly since it has judicially admitted that the alleged burden arising from the imposition of the taxes complained of does not reach the Government, nor its contracts with the Government, in view of appellant's failure to add the controverted taxes to the price of its bids for the work it is now doing for the Government.

That to absolve appellant from the payment of the taxes claimed would be to penalize the State of Louisiana for appellant's laches in not protecting its interest by computing every item of cost entering into the work it contracted for at the time of submitting its bids to the Government.

That the Government, under its *present* contracts with appellant, can derive no benefit or advantage from a remission to appellant of the controverted taxes since it is appellant's avowed purpose to pocket this saving and not pass it on to the Government.

That it is incumbent upon appellant to show that its *present* contracts with the Government are so burdened by the imposition of the taxes complained of as to hinder it from serving the Government thereunder as it was intended it should serve it, and this appellant has failed to do.

That it was incumbent upon appellant to show that the imposition of the taxes in contest actually serve to increase the cost of the work to the Government, and that this added cost tends to burden the Government in the exercise of its delegated powers, neither of which appellant has done nor can do since its *present* contracts with the Government admittedly do not purport to pass this extra cost on to the Government even if it may be conceded that such a "burden" would actually impede the Government in the exercise of its delegated powers.

That this Honorable Court is not concerned *in this action* with the possible *future* effect upon the Government,

or the possible effect upon its *future contracts* for public work, which the imposition of the controverted taxes may in the future have upon it or its contracts, but must determine solely whether the Government is *presently* affected, and whether its present contracts are burdened, and insofar only as the issue is presented in the *present* action.

And, finally, that appellant's transitory contractual relations with the Government cannot serve to transform it from an admittedly independent contractor into such an agency or instrumentality of the Government as may rightfully lay claim to the exemptions and immunities from taxation which are ordinarily accorded to such agencies and instrumentalities.

For these reasons we hold the judgment of the District Court should in all respects be affirmed.

Respectfully submitted,

GASTON L. PORTERIE,
Attorney General of Louisiana;

PEYTON R. SANDOZ,
Special Assistant Attorney General
of Louisiana;

JUSTIN C. DASPIT,
Special Assistant Attorney General
of Louisiana;

Counsel for Appellee.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 355

TRINITYFARM CONSTRUCTION COMPANY,

APPELLANT,

vs.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS OF THE STATE OF LOUISIANA,

APPELLEE.

PETITION FOR REHEARING

D. K. WOODWARD, JR.,
H. PAYNE BREAZEALE,
VICTOR A. SACHSE,
Counsel for Appellant.

No. 355

SUPREME COURT OF THE UNITED STATES

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ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS OF THE STATE OF LOUISIANA,

APPELLEE.

PETITION FOR REHEARING

To the Honorables, the Chief Justice and the Associate Justices of the Court:

Comes now Trinityfarm Construction Company appellant herein, and respectfully presents this its petition for rehearing of said cause upon the following:

GROUNDS FOR REHEARING

1.

The Court erred in holding that the challenged tax is not a direct burden on the federal contract.

2.

The Court erred in holding that payment of the challenged tax on operations of appellant constitutes only a consequential or remote burden on the federal government.

3.

The criterion as to the validity of the tax is its bearing upon the federal instrument—here the government contract for construction of the levee. The burden of the questioned tax falls directly upon the federal contract and the Court erred in failing to so hold.

4.

The effect of the tax upon federal operations, not the manner in which it is laid or the method by which it is collected, determines its validity. The effect of the tax here is to burden, retard and impede federal operation in that the whole amount of the tax falls as a direct charge upon the federal treasury and the Court erred in failing to so hold.

5.

The federal undertaking sought to be accomplished through means of the contract between the government and appellant was the completion of the designated levees. The federal government had an immediate and direct concern in the performance of its contract until finally completed, and the Court erred in holding that a tax laid upon an operation essential to such completion was not laid upon a transaction in which the federal government is immediately and directly concerned.

6.

It is the established law of this Court that a property or ad valorem tax does not constitute a prohibited burden on a federal or interstate commerce undertaking in connection with which such property is used but that a use or occupation tax charged as the price for the privilege of using such property in such an undertaking is a direct and, therefore, a prohibited burden on such undertaking. The Court erred in applying to these distinct types of taxes the same criterion and in holding that the challenged tax on the use of gasoline in performing the work required by the federal instrument was not a direct burden thereon.

7.

The operation sought to be subjected to the tax lies beyond the jurisdictions of the State and the Court erred in failing to so hold.

Submitted herewith is an argument in support of this petition to which the attention of the Court is respectfully directed.

Respectfully submitted,

D. K. WOODWARD, JR.,
H. PAYNE BREAZEALE,
VICTOR A. SACHSE,
Counsel for Trinityfarm Construction Company, Appellant.

I, Victor A. Sachse, of counsel for appellant, hereby certify that the foregoing petition is presented in good faith and not for delay.

Baton Rouge, La.
April 27, 1954
Victor A. Sachse

Submitted herewith is an argument in support of this petition to which the attention of the Court is respectfully directed.

Respectfully submitted,

D. K. WOODWARD, JR.,
H. PAYNE BREAZEALE,
Counsel for Petitioner.

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FILED

SUPREME COURT OF THE UNITED STATES.

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No. 355

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ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

D. K. WOODWARD, JR.,
H. PAYNE BREAZEALE,
VICTOR A. SACHSE,
Counsel for Appellant.

CASES CITED

	Pages
Anglo-Chilean Nitrate Co. v. Alabama, 228 U. S. 218	3
Burnet v. Coronado Oil & Gas Co., 285 U. S. 393	2
Choctaw & Gulf R. R. Co. v. Harrison, 235 U. S. 292	2, 3, 9
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East Ohio Oil Co. v. Commission, 283 U. S. 465	3
Gillespie v. Oklahoma, 257 U. S. 501	2, 9, 10
Helson v. Kentucky, 279 U. S. 245	3, 6
Horn Silver Mining Co. v. New York, 143 U. S. 302	12
Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522	2, 8
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 355

TRINITYFARM CONSTRUCTION COMPANY,

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vs.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS OF THE STATE OF LOUISIANA,

APPELLEE.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

May It Please the Court:

This case is the first instance, so far as our investigation has disclosed, in which a state has been permitted to pass the burden of an excise tax directly upon the federal treasury. That such is the effect of the opinion is demonstrably true.

It sufficiently appears from the opinion that the contract between the government and appellant is the federal instrument here involved. A different

conclusion could not have been reached consistently with the facts and with numerous decisions of this Court. Choctaw & Gulf R. R. Co. v. Harrison, 235 U. S., 292; Gillespie v. Oklahoma, 257 U. S. 501; Burnet v. Coronado Oil & Gas Co., 285 U. S. 393; Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522. The validity of the tax is to be determined with reference to its practical effect—as to how its burden falls—upon that contract.

Appellant has not denied its status as an independent contractor. It has not asserted that it is a governmental instrumentality. It has asserted, and it bases its claim upon the assertion, that its federal contract is a federal instrument or means and that such contract, by the decisions of this Court, is immune from direct burden by state tax.

Appellant recognizes that property taxes laid upon its equipment constitute no such burden. This was first ruled in McCulloch v. Maryland, 4 Wheat, 316, 400, 436, and has been reaffirmed in innumerable cases since with reference both to federal instruments and to interstate commerce.

Appellant affirms, on the other hand, that taxes upon its operations fall directly upon its contract and are, accordingly, prohibited. The precise question has not heretofore been before the Court but its decisions in analogous cases lead inevitably to the conclusion relied upon.

It cannot be regarded as necessary to comment at any length upon the differences in nature and effect between a property tax and a tax on operations—an excise tax. This Court has repeatedly made the

distinction and sustained the former while holding the latter void. Choctaw O. & G. Ry. Co. v. Oklahoma, 235 U. S. 292; Choctaw O. & G. Ry. Co. v. Mackey, 256 U. S. 531.

The distinction has been universally recognized and applied in interstate commerce cases. Physical properties of carriers situated within a state are subject to property taxes even upon values arrived at by reference to use in interstate commerce but, as stated in East Ohio Oil Co. v. Commission, 283 U. S. 465, it is elementary that a state cannot lay a tax on the act of engaging in interstate commerce. See also Pullman Co. v. Richardson, 261 U. S. 330; Anglo-Chilean Nitrate Co. v. Alabama, 288 U. S. 218; Helson v. Kentucky, 279 U. S. 245.

This distinction, consistently with innumerable former rulings of this Court, should be given effect here unless, indeed, this case is intended to mark the point of definite departure from the former rule. The Court says: "If the payment of state taxes imposed on the property **and operations** of appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct." We have not found another case where the Court, when called upon to decide questions identical in principle, has combined the two types of taxes in announcing the rule. On the contrary, the distinction has been steadfastly maintained and adherence to it has provoked dissents of unusual vigor.

It is recognized that two schools of thought exist upon this vexed question. One, heretofore approved by the majority opinion of this Court, maintains

that immunity, to be substantial, must extend to operations of the protected undertaking, whether it be that of a federal instrument or a transaction in interstate commerce; the other supports the view that the practical requirements of immunity are met notwithstanding operations necessarily involved in the protected undertaking are made subject to state taxes of general application not aimed specifically at such undertaking.

It is a question of policy, rather than one strictly of law, and the correct policy is to be determined exclusively by this Court. That both views are supported by arguments of great strength and cogency goes without saying.

Pertinent to a determination of the correct policy is a brief review of the essential bases of the two types of tax involved. A property tax is properly laid upon all property within the taxing jurisdiction. In return for the tax so laid the taxing sovereign extends protection to the right of ownership. Property so subjected to the tax is held by local law, is protected by exertion of local powers. That it should pay its fair share of the costs of these local services is universally recognized.

Excise taxes, on the contrary, find no basis in the protection of rights of ownership. On the contrary they are additional taxes, laid to secure revenue, for which nothing is directly returned to the taxpayer. Prior to enactment of the tax here under consideration gasoline was handled in the state in the exercise of natural rights of the citizen. The state needed additional revenue and exacted of dealers a price

for the privilege of doing what had theretofore been permitted without price. In so far as its jurisdiction extends the state was admittedly within its rights in making this levy.

But beyond its jurisdiction it is without power. This Court has recognized state sovereignty as extending to everything which exists by its own authority or is introduced by its permission. Such are its defined limits. That it has no control of any kind or degree of any property or right beyond its sovereignty is elementary.

Unless this Court has now announced a different rule, the sovereignty of Louisiana does not extend to appellant's contract with the government. Certainly the contract does not exist by state authority, nor is it introduced into the state by its permission. Upon what theory, then, can the state exact a price for the privilege of performing operations required by the contract? But for exertion of government power the contract would never have come into existence; would never have been performed in Louisiana or elsewhere. Only through federal generosity in an effort to protect the lands and citizens of the state from floods is the subject of the attempted tax brought wthin the borders of the state. But for the disaster occasioning this relief there would have been no operation for the state to tax. Whence comes its jurisdiction—and sound basis for exertion of the assumed power? It is wanting in fact as it is denied by precedent.

In the beginning, in a state of society much less complicated than that in which we live, the rule was stated in absolute terms and in language which for-

bade interference of any character or in any degree by a state with subjects of federal jurisdiction. In the interval the rule has been given practical application many times and, almost without exception, with a tendency to restrict its scope. It is here reannounced but denied application notwithstanding the whole burden of the questioned tax must be discharged with federal funds; funds, it is true, first paid to the contractor and then by him paid to the state but, none the less, funds coming directly from the treasury and the payment being one which, but for the tax, would be saved by the treasury. The burden thus imposed on the treasury is held consequential and remote. It is submitted that it is, in fact, inevitable and direct.

It is indicated in the opinion that a tax laid upon the contract would be held void. Is not a tax laid as the price of the privilege of performing the contract in fact laid upon the contract? This Court, by strongest analogy, has so held. In the Helson case and in many other decisions on interstate commerce are found repeated statements difficult, if not impossible, of reconciliation with a different view.

The Helson case has properly been limited to the facts there presented but, as so limited, it is still the law unless, indeed, it must be considered as overruled in principle by the decision here. The two cases are identical except that there the gasoline was used in performing an act of interstate commerce while here it is used in performing a federal contract. It cannot reasonably be said that a tax laid upon use of gasoline in interstate commerce directly burdens

that commerce and at the same time asserted that an identical tax laid upon use of gasoline in a federal contract does not directly burden that contract. It is self evident that the same tax, laid on the same operation, must of necessity, exert an identical burden on each undertaking. The burden may be prohibited in one case and permitted in another, but this circumstance cannot alter the fact that the incidence of the tax is the same upon each undertaking.

Even if precedent in this Court were lacking it could not reasonably be doubted that the burden of the questioned tax falls directly upon the contract; that it is in effect laid upon the contract. The contract is something more than the writing which evidences its terms. It is a continuing relationship between the parties to it. It demands of appellant the performance of certain operations—certain acts which must be done to complete the work called for by the contract. The whole value of the contract depends upon the aggregate cost of those operations. If those costs are increased its value is lessened; it is directly burdened to the exact extent of the increase. If a state may tax each operation involved, as is here held, it may add to the cost of those operations at will; may completely destroy the whole value of the contract. To deny that such a burden is inevitable, that it is direct or that it may become utterly destructive is to disregard universal human experience.

But, it may be said, the burden, if it be directly upon the contract, falls upon the contractor, not upon the government. The proposition cannot be

conceded. Admittedly, the government has no peculiar concern for the welfare of the contractor, and if he alone is affected the case is without merit. But the tax in operation falls directly upon the government and not upon the contractor. Its full effect falls directly upon the government at the very inception of the transaction; at the time the government bargains for the price of its work.

An actual case will emphasize the contention made. In January, 1934, the state of Arkansas adopted an act known as S. B. 8, which imposed a similar tax of 6½ cents per gallon on gasoline used within the state. Immediately government engineers integrated the amount of the tax into comparative estimates of costs and notified prospective bidders of their action advising them of the respective amounts per cubic yard which had been added on each piece of work. The purpose and effect of this notice was to raise bids to the government by an amount sufficient to cover the whole amount of the tax. The practical operation of the rule here announced is thus shown. It leaves the contractor exactly where he was and passes the tax directly to the government. This may or may not be sound policy; that it is the undoubted, inevitable effect of the decision cannot be doubted.

In the Indian Territory case the Court says: "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them." The rule is sound beyond peradventure. Is it possible that it can apply to a contract to explore for oil and not to a contract to build a levee? Human reason rebels at any such suggestion.

The distinction, if there be one, must then be sought in the nature of the taxes involved. We must assume that the Court is concerned with the effect of the tax, with its practical operation, not with the name by which it is called, the way in which it is measured, the object on which it is said to be laid or the machinery for its collection. It has repeatedly so held. Any other basis of analysis would subordinate substance to form, a practice always happily rejected by this Court.

The tax there was upon capital stock representing the value of the lease; here it is upon operations. A government contract was involved as the federal instrument in each case. Unless this Court is prepared to depart from the rule announced in the Helson case it must hold a tax on operation essential to a contract to be a tax on the contract itself. No other holding can accord with facts of human experience. It cannot be said that a tax on stock representing the value of a contract or on income from a contract is a tax upon the contract and at the same time that a tax on operations from which income necessarily must be derived, is not a tax upon the contract. Choctaw, O. & G. Ry. v. Harrison, supra Gillespie v. Oklahoma, supra.

A tax upon operations here permitted extends, of course, to all operations. It is properly held in the opinion that all other machinery of appellant is as closely connected with the work as is the gasoline. It follows inevitably that the state is now permitted to tax the **operation** of each piece of machinery; each drag line, each tractor, each dredge, each tower excavator. Is not such a tax inescapably

such a one as could be used to destroy the power to make contracts in which such operations are essential?

Let us apply the same test to the Gillespie case and note its effect on the contract of lease there involved. The drilling of oil wells is an operation essential to production of income from the Indian lease. It is a proper object of excise tax. Control of oil production is an economic question now actively agitated and one upon which radical differences of opinion exist. An effective method of control is to be found in an excise upon sundry operations involved in oil production—for that matter upon the very act itself of producing oil. Congress, for its Indian wards, has exclusive dominion over oil underlying their lands. Oklahoma elects to curtail or to stop oil production in the state and lays excises on operations in the oil producing industry effective to that end. Congress has selected the means of the lease contract as a desirable one for securing for its wards the value of their oil. Such contracts provide for a royalty to the government and an "operating interest" to the lessee. As the hazard and expense of operation increases, the proportion of the "operating interest" increases and the proportion of the royalty interest decreases. If the expense of operation is made prohibitive production stops. These are facts of every day experience not susceptible of change by differing theories upon taxation.

We have then this situation. Congress desires to produce oil under its dominion by the means deemed by it most desirable. Oklahoma decrees that oil shall not be so produced and lays its taxes accordingly.

The power to lay the tax has destroyed the power to make the lease. That which is supreme has yielded to that which is not supreme.

Or let us suppose that the Oklahoma excise is not intended to be destructive but is adopted merely for purposes of increased revenue. It falls inevitably in the first instance on the operating interest and not upon the royalty owner, the government. But for how long? Only until a new lease is to be negotiated. At such time the operating interest is increased by the amount of the tax and the royalty interest correspondingly decreased. The Indian ward thus contributes to the Oklahoma treasury—to a sovereignty to which he is not subject and in the affairs of which he can have no voice.

Should he complain he must be told that the government which assumed his guardianship had powers to protect his property but deemed it unwise to do so; that it was better policy to let the state destroy the value of his lease by taxing operations essential to it than to restrain it from so doing; that income to the corporate lessee would be protected from tax should the state permit any income to be derived, because such a tax would burden the lease, but that taxes on operations, however destructive of value, were remote in incidence and therefore beyond federal control. If the ward should feel that he was in this way being compelled to contribute more than his "fair share" to the expense of Oklahoma's government he would not lack for political or judicial precedent to support his belief.

A further anomaly appears. It is the established rule of this Court that a foreign corporation seeking to perform a federal contract need not take out a permit in the state where the work is to be done. Pembina v. Penna., 125 U. S. 181; Horn Silver Mining Co. v. N. Y., 143 U. S. 302. Such a tax would obviously impede the choice of means. Such a contractor may not for like reason be charged a state occupation tax for the privilege of performing its government contract or a state franchise tax for the privilege of exercising its functions exclusively in government work within the state. All of these forbidden levies are held to be laid upon the choice of means, the making of the contract or the contract itself.

Judged by their practical effect upon the operation as a whole—the construction of government levees—they are, in the aggregate, insignificant in amount and remote in application upon the federal government as compared to the tax here questioned. It is not overstating the case to say that the gasoline excise on a single contract of average magnitude will cost the federal government more money than it will save in the combined prohibited taxes in a period of years. If similar excises follow on the use of other parts of contracting equipment, as is now definitely permitted, the burden on the government will be limited only by the ingenuity and resourcefulness of tax-minded legislators and we find the anomalous situation in which federal funds may thus be drawn upon by the several states and applied to their local needs. The immunity of the federal sovereign,

consistently described as absolute, is thus destroyed. By the doctrine here announced, the state adds to the price of government work the amount of such taxes as the state, and not Congress, may think proper. To the full extent necessary to meet its levy, it fixes the price which the government must pay to have its contracts performed. To say that the government in these circumstances is left free to exert its functions, that it is not hindered, delayed, impeded or retarded, is to disregard the facts of human experience.

It is arguable that sound public policy justifies this course; that the federal government in pursuit of its exertions in the several states should stand as any citizen with respect to local levies of all kinds; that these payments toward state expenses from the federal treasury are wholesome and to be desired from the standpoint of the general good. That we cannot share this view is of no consequence. What we do assert, with utmost deference, is that such a policy is fundamentally inconsistent with federal immunity as heretofore defined.

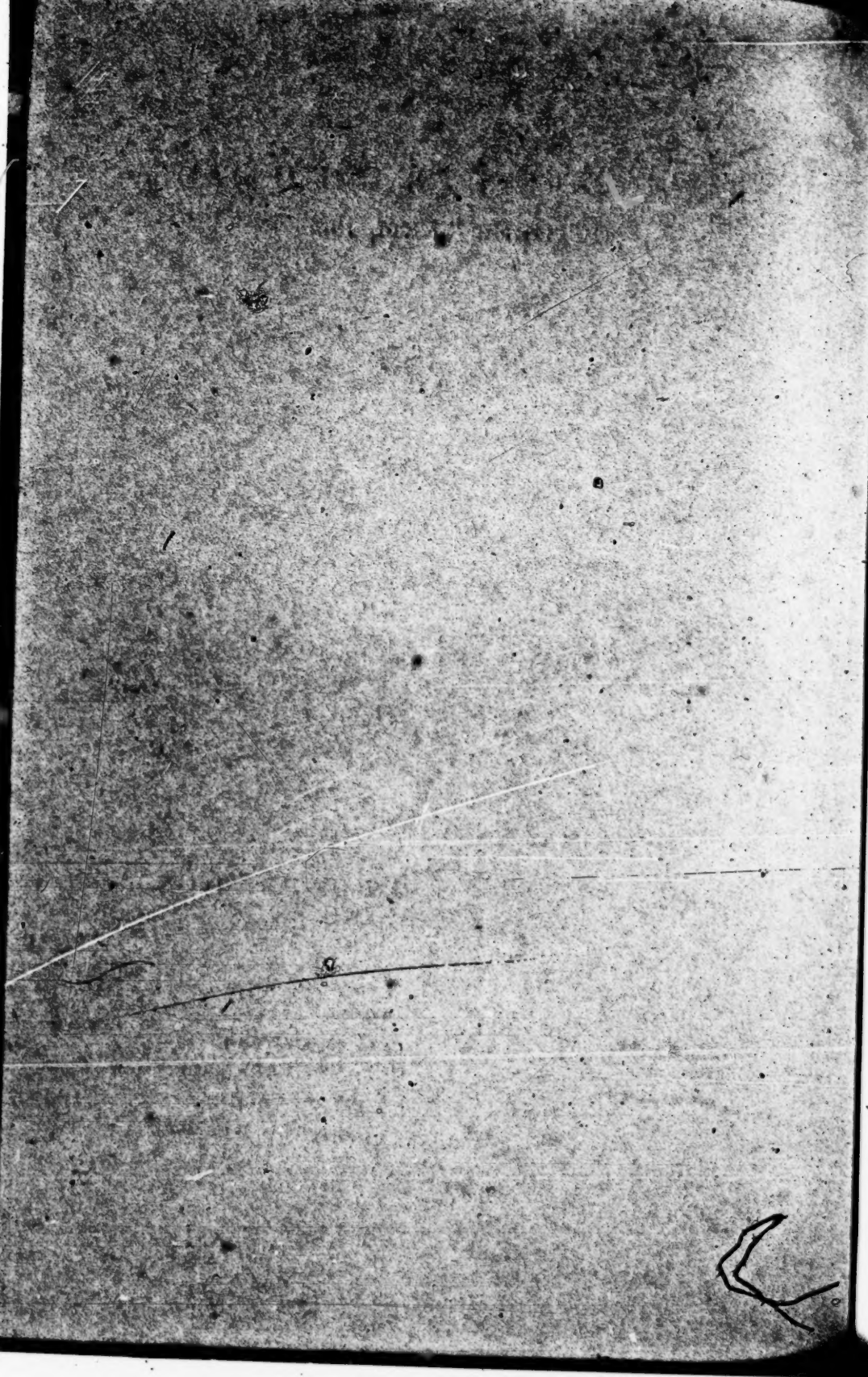
In the instant case authoritative expressions in the opinion of the Court have led to a situation which cannot but be regarded as unfortunate. Appellant was advised that federal immunity is absolute in form and at least stricter in substance than interstate commerce immunity; that a tax on operations in interstate commerce is a prohibited tax on interstate commerce itself and that a tax upon a lease contract is a tax upon the power to make that contract and, accordingly, forbidden, since it could

be used to destroy the power to make such a contract. Reasoning from these announced rules it could not escape the conclusion, consistent as it is with practical experience, that the asserted tax is a tax upon its contract and, accordingly, void. So believing, it declined to burden the government, as it could have done, with an amount sufficient to meet the tax, and now finds itself subjected to heavy loss as a result of having sought to apply the principle announced. It could not foresee that if it operated a locomotive partly in interstate commerce and partly in performance of its government contract that the operation in interstate commerce, the less strictly protected undertaking, would be held tax exempt and the operation in its government contract, where protection was defined as absolute and more strict, would be held taxable. Reason combined with announced precedent to dictate a course which it followed in good faith to its undoing.

With utmost deference appellant submits that the rules here announced are in direct and irreconcilable conflict with the law as repeatedly adjudged by this Court. It prays that a rehearing be granted and that upon such rehearing the judgment of the lower Court be reversed.

Respectfully submitted,

D. K. WOODWARD, JR.,
H. PAYNE BREAZEALE,
VICTOR A. SACHSE,
Counsel for Appellant.



CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 355.—October Term, 1933.

Trinityfarm Construction Company, Appellant, *vs.* Alice Lee Grosjean, Supervisor of Public Accounts for the State of Louisiana.	Appeal from the United States District Court for the Eastern District of Louisiana.

[March 5, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

Appellant has contracts with the United States for the construction of levees in Louisiana to control the waters of the Mississippi River. It consumes much gasoline in the operation of machinery employed to do the work. It imports its supply from other States in carload lots and places it in a central tank from which distribution is made to other tanks located on its right of way in proximity to the machines. Appellee, an officer of Louisiana, is required to enforce the provisions of its statutes that impose an excise of five cents per gallon in respect of gasoline so imported and used.[1] The state supreme court has held that the exaction is an excise tax levied upon all gasoline or motor fuel sold, used or consumed in the State (*State* v. *Tri-State Company*, — La. —) and we accept that characterization. Claiming that these enactments are repugnant to several clauses of the Federal

[1] Act No. 6, Special Session of 1928, as amended by Act No. 8 of 1930, Act No. 16 of 1932, levies a tax of four cents a gallon "on all gasoline, or motor fuel, sold, used or consumed in the State of Louisiana for domestic consumption". § 1. The tax is collected from "dealers" who, as defined by § 2 of the Act, include "the person . . . who imports such gasoline or motor fuel from any other State or foreign country for distribution, sale or use in the State of Louisiana". And on "all gasoline or motor fuel imported from other States and used by him, the 'dealer' . . . shall pay the tax on the amount so imported and used, the same as if it has [sic] been sold for domestic consumption." Section 14 provides that the tax "shall not apply to sales to the United States Government or any agency or department thereof". Act No. 1, extraordinary Session of 1930, imposed an additional tax of one cent a gallon.

Constitution, appellant brought this suit to enjoin the collection of the tax in respect of the gasoline so used by it. A three judge court, having granted a temporary injunction, heard the case on the merits, upheld the tax and dismissed the bill. 3 F. Supp. 785.

The appellant seeks reversal on the ground that the contracts are federal means or instrumentalities, that the enactments referred to impose a direct burden upon them and that the State was without power to impose the tax. And on that basis it seeks to invoke the rule that, consistently with the Federal Constitution, a State may not tax the operations of an instrument employed by the government of the Union to carry its powers into operation. That principle, while not expressly stated in the Constitution, necessarily arises out of our dual government. It has often been given effect.[2] And reciprocally it safeguards every State against federal tax on its governmental agencies or operations.[3] Its application does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree. *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575, and cases cited. Its right application is essential to the orderly conduct of the national and the state governments and the attainment of justice as between them.

The power granted by the commerce clause is undoubtedly broad enough to include construction and maintenance of levees in aid of navigation of the Mississippi River and to authorize the performance of the work directly by government officers and employees or pursuant to contracts such as those awarded to appel-

[2]M'Culloch *v.* Maryland, 4 Wheat. 316, 400, 436; Weston *v.* Charleston, 2 Pet. 449, 463, 466, et seq. Dobbins *v.* The Commissioners of Erie County, 16 Pet. 435, 443, 447. Farmers Bank *v.* Minnesota, 232 U. S. 516, 526. Choctaw & Gulf R. R. *v.* Harrison, 235 U. S. 292. Indian Oil Co. *v.* Oklahoma, 240 U. S. 522. Gillespie *v.* Oklahoma, 257 U. S. 501. Panhandle Oil Co. *v.* Knox, 277 U. S. 218. Cf. Susquehanna Co. *v.* Tax Comm. (No. 1.), 283 U. S. 291.

[3]The Collector *v.* Day, 11 Wall. 113. United States *v.* Railroad Company, 17 Wall. 322, 327. Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 584. South Carolina *v.* United States, 199 U. S. 437, 452, 461. Indian Motocycle Co. *v.* United States, 283 U. S. 570. Burnet *v.* Coronado Oil & Gas Co., 285 U. S. 393. Cf. Metcalf & Eddy *v.* Mitchell, 269 U. S. 514. Group No. 1 Oil Corp *v.* Bass, 283 U. S. 279. Burnet *v.* A. T. Jergins Trust, 288 U. S. 508.

lant. The latter method was chosen and the validity of the challenged tax is to be tested on that basis. It is not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the federal government is a party or in which it is immediately or directly concerned. Nor is the exaction laid or dependent upon the amounts, gross or net, received by the contractor. The exaction in respect of its relation to the federal undertaking is wholly unlike those considered in *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292; *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522; and *Gillespie* v. *Oklahoma*, 257 U. S. 501. Appellant is an independent contractor. *Casement* v. *Brown*, 148 U. S. 615, 622. It is not a government instrumentality. Cf. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514. *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279. Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc., that are used for the performance of the contracts. These things are as closely connected with the work as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate power. If the payment of state taxes imposed on the property and operations of appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct. *Thomas* v. *Gay*, 169 U. S. 264, 275. *Metcalf & Eddy* v. *Mitchell, supra*, 524 *et seq.* *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572, 579. Appellant's claim of immunity is without foundation.

Affirmed.

Mr. Justice CARDOZO concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.